Office Supreme Court, U.S.
FILED
DEC 31 1964
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 799

RICHARD K. GORDON *et al.*,
PETITIONERS,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

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Blanchard Press, Inc., Boston, Mass. — Law Printers

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

Petitioners, Richard K. Gordon and Richard C. Simmers, by their attorneys, severally pray that a writ of certiorari issue to review the judgment of the Supreme Judicial Court of Massachusetts, entered on October 5, 1964.

Opinion of the Court Below

The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts, printed in Appendix A hereto*, is reported in 1964 Mass. Adv. Sh. 1155, 201 N.E. 2d 504.

*Appendix A is bound separately.

Jurisdiction

The judgment of the court below was entered on October 5, 1964, and is printed in Appendix F hereto. Petitions for rehearing were denied on October 8, 1964, and on October 27, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. s. 1257 (3) since petitioners had specially set up and claimed certain rights under the Constitution of the United States.

Questions Presented

I. Must a State that provides a grand jury for the initiation of criminal prosecutions require that such grand jury and each juror thereof be free of bias or prejudice in order to meet the federal standards of due process of law required by the Fourteenth Amendment to the Constitution?

II. Was it a violation of the Due Process Clause of the Fourteenth Amendment for the trial judge to refuse to permit counsel for petitioners to examine prospective petit jurors on *voir dire*, and for the trial judge to conduct an examination that was not sufficient to discover the hidden prejudices of the petit jurors, when there had been substantial pre-trial prejudicial publicity?

III. Was it a violation of the Constitution of the United States for the Commonwealth to convict petitioners for larceny when the evidence showed that the larceny concerned took place outside the territorial boundaries of the Commonwealth?

IV. When, under the established construction of the venue statutes, venue for the case presented by the prosecution could not be laid in Suffolk County or in any other county in Massachusetts, did the decision of the Supreme Judicial Court in this case, overruling the earlier construction, and adopting a construction which permitted

venue to be laid in Suffolk County, Massachusetts, violate petitioners' rights under the Due Process Clause of the Fourteenth Amendment, and the *Ex Post Facto* Clause of Article I, section 10, of the United States Constitution?

V. Was it a violation of the Due Process Clause of the Fourteenth Amendment and the *Ex Post Facto* Clause of Article I, section 10, of the Constitution of the United States, for the Commonwealth to convict petitioners of larceny by false pretences when the evidence was insufficient to show:

> A. that petitioners (1) had any intent to steal, or (2) knowingly joined in a conspiracy to steal, or (3) knew that false representations were made, or (4) concurred in the making of the false representations, or directed them, or that they were made in petitioners' presence; or
>
> B. that the Massachusetts Parking Authority, or any of its members, servants, agents, or employees, believed the truth of and relied upon, the allegedly false statements; or
>
> C. that the Massachusetts Parking Authority had either a general or a special property interest in, or possession or constructive possession of, the money alleged to have been stolen;

when, prior to the decision below, such proof would have been required for conviction?

Constitutional Provisions Involved

The constitutional provisions involved are Article I, section 10, clause 1, Article IV, section 2, clause 2, and section 1 of the Fourteenth Amendment of the Constitution of the

United States, and Article 12 of the Declaration of Rights of the Massachusetts Constitution. They are printed in Appendix B, *infra*, p. 50.

Statutes Involved

The following sections of the Massachusetts General Laws (Ter. Ed.) are involved: c. 234, s. 28; c. 266, s. 30; c. 268, s. 8 (1961); c. 268, s. 9 (1961); c. 277, s. 58; c. 277, s. 59; c. 278, s. 9. In addition, Mass. St. 1958, c. 606; Mass. St. 1962, c. 779. They are printed in Appendix C, *infra*, pp. 51-61.

Statement of the Case

On May 31, 1962, a Suffolk County, Massachusetts, grand jury returned two indictments in which the petitioners Richard K. Gordon and Richard C. Simmers were named as defendants. Indictment No. 4018 of 1962 (No. 8185 of 1964) charged that on March 2, 1960, the defendants Gordon and Simmers, and the defendants George Lewis Brady and Francis W. Kiernan "did steal money of the amount and of the value in all of four hundred and fifty thousand dollars, of the property of the Massachusetts Parking Authority, a body politic and corporate."[1] (R.[2] 1-2.) Indictment No. 4020 of 1962 (No. 8187 of 1964) charged that between December 2, 1958 and the date on which the indictment was returned, the defendants Gordon and Simmers conspired with Brady and Kiernan, also named as defendants, and with The Foundation Company, a New York corporation, William F. Thompson and Maurice A. Broderick, named as co-conspirators but not as defendants, to steal "money of an amount and value in excess of one

[1] In violation of G.L. (Ter. Ed.) c. 266, s. 30.

[2] The Summary of the Record will be referred to as "R.".

hundred dollars, of the property of the Massachusetts Parking Authority." (R. 135-136.)[3]

At their arraignment on June 4, 1962, the petitioners Gordon and Simmers remained mute. Pleas of not guilty were entered in their behalf by direction of the court. (R. 2-3.)

Prior to trial, the petitioners moved in each case for a bill of particulars. (R. 3, 137.) The Commonwealth's amended bill of particulars filed pursuant to the order of the court in the larceny case, No. 4013 of 1962 (No. 8185 of 1964), specified as the place where the offense was alleged to have been committed: "From the Massachusetts Parking Authority Construction Fund Trustee Account in the custody of The First National Bank of Boston, at Boston, Suffolk County, Massachusetts." The amended bill of particulars also specified as the manner and means by which the offense was alleged to have been committed: "The defendant(s) with intent to defraud obtained by false pretenses the making of a check and in consequence and by means thereof and as part of the same transaction by said false pretenses and with said fraudulent intent induced another to part with said check and with money, and thereby obtained said money; said false pretenses being false representations by word and by act and by the making, execution and submission of false and fraudulent documents including contracts, bills, requisitions and statements for services and work never performed which were well known

[3] Actually, the grand jury returned six indictments including the two summarized in the text. Nos. 4017 and 4019 of 1962 did not involve the defendants Simmers and Gordon and their motion to be tried separately from those indictments was allowed (R. 6-7). No. 4021 of 1962 (No. 375 of 1963) charged the defendants Simmers, Gordon and Kiernan with conspiring to extort money from The Foundation Company. No. 4022 of 1962 (No. 376 of 1963) charged Kiernan alone with extorting money from that company. All three defendants were acquitted by direction of the court on No. 4021 of 1962 and No. 4022. (Tr. 1620-1623.)

to be false and fraudulent by said defendant(s)." (R. 54-55, 75-76.) The Commonwealth's bill of particulars, filed pursuant to the order of the court in the conspiracy case, No. 4020 of 1962 (No. 8187 of 1964), specified as the place where the offense was alleged to have been committed: "Boston, Suffolk County, Massachusetts, and each and every other place where the opportunity arose to conspire to commit the offense set forth in the indictment;" and as the manner and means by which the offense was alleged to have been committed: "Each defendant assisted one or more of the other defendants in conspiring to commit the offense set forth in the indictment; and more particularly by the certification of a false and fraudulent requisition by the defendant Kiernan and resulting in the stealing of money of an amount and value in excess of $100, the property of the Massachusetts Parking Authority." (R. 175-176.)[4]

The petitioners also moved prior to trial to quash both indictments because returned by grand juries calculatedly prejudiced against them by governmentally inspired publicity in violation of the Due Process Clause of the Fourteenth Amendment to the Federal constitution. After a hearing, that motion was denied by Superior Court Judge Quirico. The petitioners saved their exceptions. (R. 78-93; Tr.[5], dated February 15, 1963.)

Trial was scheduled to commence before Judge Quirico and a jury on April 1, 1963.[6] At the opening of court that morning, the petitioners again moved (1) for a continuance

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[4] The Commonwealth's motion to amend the indictment, by deleting the name of the Authority as the body politic whose money was stolen, and "by substituting therefor the words 'The First National Bank of Boston, a national banking corporation, as Construction Fund Trustee of the Massachusetts Parking Authority Construction Fund Trustee Account' ", was denied. (R. 11.)

[5] The transcript will hereinafter be referred to as "Tr.".

[6] Prior to that time, the court ruled that Brady was mentally incompetent to stand trial (R. 12.) Brady still has not been tried.

and, in the alternative, for a change of venue, and (2) to discharge the jury panel, because the effect of the massive, prejudicial publicity had not so far worn off that it could reasonably be said, as required by Art. 12 of the Declaration of Rights to the Massachusetts Constitution and the Fourteenth Amendment to the Federal Constitution, that the trial could proceed in Suffolk County free of the hostile atmosphere and public preconception of guilt prevalent at that time. After a hearing, that motion was denied subject to their exceptions. (R. 13; Tr. 11-19.) The petitioners then moved for leave to conduct a *voir dire* examination of prospective jurors and, in the alternative, for the court to put suggested questions to the prospective jurors, to enable the petitioners to prove that many, if not all, of the prospective jurors had been in fact prejudiced by the massive, prejudicial pre-trial publicity. That motion was also denied after a hearing. They claimed exceptions to such denial. (R. 13-14; Tr. 19-24.)

At the trial, which continued for more than two weeks to April 16, 1963, there was evidence from which the jury could have found the following:

On October 3, 1958, the legislature enacted St. 1958 c. 606 (Ex. 1.). That Act created the Massachusetts Parking Authority (hereinafter sometimes referred to as the "Authority"), consisting of three members (s. 3); and defined its powers and duties, including the authority to construct, maintain and operate a public garage under the Boston Common, (b) to finance the cost of the construction of the garage by the issuance of Common garage revenue bonds payable solely from revenues and (c) to enter into or adopt a trust agreement or resolution which would contain provisions for the issuance of such bonds, for the use of the proceeds thereof [which were to be deemed to be trust funds] solely for the payment of the cost of the project, for the pledge or assignment of the revenues as security for

the payment of the bonds, and for the protection and enforcement of the rights and remedies of the bondholders (ss. 5. 8, 9, 12).

Following the creation of the Authority, George Lewis Brady, Joseph W. Monahan, Jr., and Herman Carp were appointed as members of the Authority. Brady was designated as Chairman. Soon after his appointment, Carp resigned and James J. Sullivan, Jr., was appointed in his stead. The first two and Sullivan continued to serve during the events hereinafter described. (Exs. 2-A - 2-E, inclusive.)

In the spring of 1959, Brady met William F. Thompson, Chairman of the Board of Directors of The Foundation Company, at LaGuardia Airport. Thompson was named as a co-conspirator, but not as a defendant, in the conspiracy indictment. Brady told Thompson that The Foundation Company would have to pay $300,000 to get the Parking Garage contract and that unless The Foundation Company would do this, they would not get the job. Brady also said that he understood that the company had a box of cash that it kept for this purpose. Thompson denied that this was the case.[7] (Tr. 915-925.)

Later that spring, Maurice A. Broderick, a New Hampshire attorney and a brother-in-law of Brady, met Thompson at the Ten Park Avenue Hotel, New York City. Also present were William A. Shea, an attorney for The Foundation Company, and one Dolan, the President of a Waltham Bank. Broderick was named as a co-conspirator, but not as a defendant, in the conspiracy indictment. At the meeting, Thompson suggested that the $405,000.00, which The Foundation Company was to pay to Brady, could be paid over in the form of a finder's fee, an attorney's fee and a subcontract—$150,000.00 for a finder's fee, $100,000.00

[7] The classic example of a request for a bribe.

as an attorney's fee and $155,000.00 for a subcontract. Broderick told Brady about his talk with Thompson. (Tr. 467-469.)

On April 1, 1959, Broderick organized a New Hampshire corporation under the name of Granite State Realty & Construction Co., Inc. (Tr. 461-463.)

In November of 1959, Broderick asked a friend of his, Edward F. Plourde, whether the latter would be willing to serve as the finder of record and receive for him a fee of $150,000.00 in connection with a Boston construction project. Plourde agreed to act as the finder of record. (Tr. 689-692.)

On February 20, 1960, Broderick went to the New York office of The Foundation Company where three letters were prepared and then signed by Chester W. Campbell as President of The Foundation Company. The first letter (Ex. 16), back-dated to May 4, 1959, was addressed to Plourde. In that letter the company offered to pay Plourde a finder's fee equal to two percent of the gross contract price of any construction work that the company obtained through his efforts. The letter provided that if Plourde's fee on any one job should exceed $100,000.00, the company would pay him a sum not to exceed $100,000.00 on the signing of the contract and the balance in the same proportions as the company received its payments from the owner. The second letter (Ex. 17), back-dated to June 17, 1959, was addressed to Broderick. In that letter, the company agreed to pay Broderick for legal services rendered and to be rendered for the Boston Common Garage and other projects the sum of $100,000.00 as follows: $50,000.00 "upon receipt of the mobilization item. $15,000.00 60 days thereafter and the balance of $35,000.00, February 1, 1961." The third letter (Ex. 15) was only back-dated to February 11, 1960. It was addressed to Granite State Realty & Construction Co., Inc. It stated that upon the company's obtaining a contract with the Authority for the Boston Common Garage, it would

enter into a contract with Granite State Realty & Construction Co., Inc., under the terms of which it would pay Granite State Realty & Construction Co., Inc. $40,000.00 for the construction of four buildings, $25,000.00 for the construction of certain fences, $40,000.00 for the construction of four kiosks and $50,000.00 for the attached list of construction equipment and supplies. (Tr. 473-479.)

On February 23, 1960, the Authority, pursuant to Resolution No. 7 (Ex. 10), executed an underwriting agreement (Ex. 11) with John Nuveen & Co. (hereinafter sometimes called "Nuveen"). By the terms of that agreement, Nuveen agreed to underwrite the sale of $9,600,000.00 worth of the Authority's Common garage revenue bonds, provided that "at the time of closing, the Authority shall have entered into a . . . contract . . . for the construction of the Boston Common Garage . . . with The Foundation Company . . . which contract shall provide that the time of construction shall commence upon the date of delivery of the bonds to the undersigned (Nuveen) and payment therefor and the payment by the Authority to The Foundation Company of the initial payment for architectural and engineering services theretofore rendered, as provided in Article 5(a) of said contract . . ." (Ex. 11; Tr. 370.)

On the same day, February 23, 1960, the Authority also adopted Resolution No. 8, establishing four trusts called Construction Fund, Sinking Fund, Revenue Fund and Reserve Maintenance and Replacement Fund (Ex. 6, pp. D-7, D-13, D-14; Tr. 324-331.) Section 402A of that resolution provided that a portion of the proceeds realized from the sale of the bonds was to be "deposited with and held by the Construction Fund Trustee . . . for the credit of the Construction Fund, . . . held in trust and applied only for the payment of the Cost of the Project . . . , and (were by the resolution) . . . assigned to and pledged to the Construction Fund Trustee, pending such application, for the benefit

of the Holders of the Bonds and for the security of the payment of the principal of and interest on such Bonds, and shall at all times be subject to the lien of such assignment and pledge until paid out and transferred as herein provided." (Ex. 6, pp. D-7, D-8; Tr. 325-326.) Section 406 of the resolution provided that before any payment could be made on account of the Cost of the Project, the Authority was required to file with the Construction Fund Trustee (A) a requisition, signed by an authorized officer of the Authority, setting forth the name of the person to whom the payment was to be made, the amount to be paid, the purpose, by general classification, for which the payment was to be made, and that obligations in the stated amount had been incurred by the Authority and that each item included in the requisition was a proper charge against moneys in the Construction Fund and had not been paid; and (B) a certificate, signed by the Construction Engineer and attached to the requisition, certifying his approval thereof and that each obligation had been properly incurred and was then due and unpaid and that, in so far as such obligation had been incurred for work, materials, equipment or supplies, such work had actually been performed, or such materials, equipment or supplies had actually been installed, in furtherance of the construction of the Project or delivered at the site of the work for that purpose, or delivered for storage or fabrication at a place or places approved by the Construction Engineer. (Ex. 6, pp. D-9, D-10; Tr. 326-329.)

On the same day, the Authority passed Resolution No. 11, appointing the New York firm of Muzillo and Tizan as Construction Engineer. (Ex. 8; Tr. 341-342.)

At the same time, the Authority also adopted Resolution No. 13, designating the First National Bank of Boston as the Construction Fund Trustee. (Ex. 9; Tr. 343.)

Also adopted on February 23, 1963, was Resolution No.

14, authorizing the execution of a contract for the construction of the Boston Common Garage project with The Foundation Company. The resolution approved the form of contract to be executed with The Foundation Company, on which appeared in writing, "Within contract hereby approved, Muzillo and Tizan, by F. W. Kiernan." The form of contract provided for the payment of $7,500,000.00 for all of the work, of which six percent was to "be paid to the contractor (The Foundation Company) on the effective date of this contract as payment for architectural and engineering services heretofore rendered by the contractor in connection with the project," and the balance on the basis of monthly requisitions. (Ex. 7; Tr. 332-335.)

On March 2, 1960, the closing took place at the New York offices of The Foundation Company. (Tr. 1156-1182.) Among those present were Brady, Monahan and Sullivan, the Chairman and Members, respectively, of the Authority; Mrs. Dolores Arena, Secretary-Treasurer of the Authority; the defendant Kiernan; George J. Gruner, Vice President of Nuveen, the underwriters; William F. Thompson and Chester W. Campbell, Chairman of the Board and President, respectively, of The Foundation Company; and Walter N. Burnett, assistant Vice President of the First National Bank of Boston. (Tr. 305-307.)

The contract with The Foundation Company (Ex. 4) was executed as the first order of business. It was signed by Brady, Monahan and Sullivan in behalf of the Authority; by the defendant Kiernan for Muzillo and Tizan, the Construction Engineer; and by Campbell for The Foundation Company. (Tr. 308.) Then Burnett delivered to the Authority a letter (Ex. 59), signed by Joseph Birmingham, a Vice President of the First National Bank of Boston, accepting appointment as Trustee of the Construction Fund, pursuant to the Authority's Resolution No. 13. Gruner then delivered Nuveen's check made out to the Authority for

$7,732,000.00 (Ex. 70), representing a portion of the net proceeds realized from the sale of the bonds, to Brady, who endorsed it and then handed it over to Mrs. Arena. She endorsed and delivered the check to Burnett, who then deposited that check into the First National Bank of Boston's standing New York account in the Chemical Bank New York Trust Company, by delivering that check and a deposit slip to a representative of that bank.

At the same time, Requisition No. 1 (Ex. 5), signed by Brady, Herman Carp, who upon his resignation as a member of the Authority had been appointed as its General Manager, and the defendant Kiernan, was delivered to Burnett. That requisition, which was completed in New York, authorized the Trustee to pay $200,000.00 to the Commonwealth in repayment for the temporary funds advanced by it to the Authority and to pay $450,000.00 to The Foundation Company in "payment for architectural and engineering services as required by Construction Contract." (Tr. 316-318, 1163, 1283.)

Upon determining then and there that the requisition was in proper form, Burnett made out and delivered to The Foundation Company a First National Bank of Boston check for $450,000.00 (Ex. 23), drawn on its New York account in the Chemical Bank New York Trust Company. (Tr. 1164, 1167, 1180-1181, 1215-1217, 1225-1228, 1257, 1275, 1318-1319.) As of March 2, 1960, The Foundation Company had spent or incurred a total of only $35,246.44 for all expenses in connection with the project, including architectural and engineering services. (Tr. 1394.)

Later that day, The Foundation Company deposited that check in its account in the Chase Manhattan Bank in New York (Tr. 1408), and then issued to Plourde its check for $100,000.00 (Ex. 24), drawn on its account in the Chase Manhattan Bank (Tr. 703.)

On March 3, 1960, Plourde deposited that check in an

account in his name in the Manufacturers' Trust Company, also in New York. (Tr. 708-709.)

On March 7, 1960, the Authority ratified Brady's acts in delivering the bonds, accepting payment for them, turning a portion of the net proceeds received in payment of the bonds over to the Construction Fund Trustee, the First National Bank of Boston, and approving for payment Requisition No. 1 (Ex. 12.)

On March 24, 1960, The Foundation Company delivered to Plourde a check for $45,000.00 (Ex. 26), drawn on its New York account in the Chase Manhattan Bank. (Tr. 723.) The delivery of that check was made in New York. (Tr. 721-723.) Because the balance of the so-called finder's fee was being paid in advance, The Foundation Company was given a $5,000.00 discount. (Ex. 72; Tr. 1384-1385.) Plourde deposited that check in his New York account in the Manufacturers' Trust Company. (Tr. 726-727.)

That same day, Brady suggested to Broderick and Plourde that Plourde make out two checks payable to the petitioner Simmers:[8] one for $95,000.00 and the other for $45,000.00, because, as Brady said, he (Brady) had to get the money into Massachusetts. (Tr. 731-739.) At Broderick's request, Brady signed a note, which Broderick made out, authorizing the payment of the $140,000.00 to the defendant Simmers. (Ex. 19; Tr. 498-507.) Plourde made out the two checks. (Tr. 733-735.)

On March 30, 1960, John J. Craven agreed, at the request of the petitioner Gordon,[9] to act as a straw in a real estate transaction to be consummated in New York. (Tr. 892-893.)

The next day, the petitioners and Kiernan, Plourde and Craven met at the Manufacturers' Trust Company in New York. (Tr. 898-899.) On the way to the bank, the petitioner Simmers purchased a brief case. (Tr. 895.) Acting under

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[8] This was the earliest date on which the name of Simmers appeared.

[9] This was the earliest date on which the name of Gordon appeared.

instructions from Brady (Tr. 745-746), Plourde drew a check on his account in that bank for $140,000.00, (Ex. 27.), made payable to Craven (Tr. 752-755). He made out and signed the check in an office of the bank in the presence of Simmers, Gordon, Kiernan, and Craven. In the meantime, Kiernan had torn up the two checks that Plourde had made payable to Simmers on March 24, 1960. (Tr. 731-733, 748-749.) Craven then endorsed the check (Ex. 27) and delivered it to the manager of the bank with the request that it be cashed. (Tr. 897-898.) They all waited until the manager returned with the money, which Craven counted in the presence of Plourde, Simmers, Gordon and Kiernan. (Tr. 898-899.) After the money was counted, Simmers put the money into the brief case and they all left the bank. (Tr. 900.)

Kiernan and Plourde then proceeded with the brief case to the Birdcage Room in the Hotel Barclay in New York where they met Brady. (Tr. 759-760.) The brief case was placed on the floor, and Brady removed the money from it. (Tr. 761-765.) Plourde kept $5,000.00, most of which was still on deposit in his account, as a fee for acting as the finder of record. (Tr. 774-755.)

Later that day, Craven met Gordon in Manhattan and was paid $500.00 for endorsing and cashing the check for $140,000.00. (Tr. 901.)

There was no evidence concerning the further disposition of the so-called finder's fee or any part thereof.

On or about April 19, 1960, The Foundation Company sent its check for $50,000.00 (Ex. 20) to Broderick in New Hampshire. (Tr. 518.) He returned that check to The Foundation Company in New York, accompanied by a letter, back-dated to February 1, 1960 (Ex. 21), assigning his interest in the agreement, set forth in The Foundation Company's letter to him, dated June 17, 1959 (Ex. 17), to the petitioner Gordon. (Tr. 521-522, 604.)

At no time before or after that incident did Broderick see, meet or communicate with either the petitioner Gordon or the petitioner Simmers. (Tr. 538-539.)

On April 26, 1960, The Foundation Company sent three checks (Exs. 42, 43 and 44), totaling $100,000.00 to Gordon. By letter, dated April 29, 1960 (Ex. 79), Gordon acknowledged the receipt of the three checks and agreed to represent The Foundation Company in Massachusetts. (Tr. 1405.)

On April 28, 1960, one of the three checks (Ex. 43) in the sum of $15,000.00 was cashed at the Broadway Savings Bank in Lawrence, Essex County, Massachusetts. (Tr. 1496-1497.) Gordon received for that $15,000.00 check $5,000.00 in currency and three bank checks (Ex. 82), totaling $10,000.00. (Tr. 1497.) There was no evidence concerning the further disposition of that money or any portion thereof.

On May 6, 1960, Gordon deposited two of the checks (Exs. 42 and 44), totalling $85,000.00 in an account in the name of "Richard Gordon, Trustee," at the Merrimack Valley Bank, Andover, Essex County, Massachusetts. (Tr. 1540.) On May 9, 1960, Gordon drew a check for $85,000.00 on that bank and then cashed it at the bank. (Tr. 1544.) Simmers carried the money from the bank. (Tr. 1544-1546.) There was no evidence concerning the further disposition of any of that money or any portion of the so-called legal fee.

In the meantime, Broderick had assigned his interest in the Granite State Realty & Construction Co., Inc. to Brady. (Tr. 530.)

On June 17, 1960, the petitioners Simmers and Gordon opened an account in the name of the corporation at the Merrimack Valley Bank, Andover, Essex County, Massachusetts. (Tr. 1504-1506.) Each was authorized to sign checks against that account. (Exs. 84, 86; Tr. 1530-1531.) At the same time, The Foundation Company's check, dated June 8, 1960 (Ex. 45), for $40,000.00 was endorsed by

Gordon as Treasurer of the corporation and deposited in that account. (Ex. 85; Tr. 1514-1517.)

In September of 1960, a bill, back-dated to June 1, 1960, on stationery entitled "Granite State Realty & Construction Co., Inc., 3 Main Street, Andover, Massachusetts," was sent to he Foundation Company in New York asking payment of $40,000.00 for the construction of the four buildings for the Boston Common Garage Project. (Ex. 76; Tr. 1398-1399.)

A second bill, back-dated to August 1, 1960 (Ex. 78), was sent to The Foundation Company in New York, asking payment of $25,000.00 for the construction of fences and $40,000.00 for the construction of four kiosks for the Boston Common Garage Project.

On March 3, 1961, The Foundation Company sents its check (Ex. 46) for $25,000.00 to the Granite State Realty & Construction Co., Inc., in Andover, Mass. That check was endorsed by Simmers and Gordon, as President and Treasurer, respectively, of the corporation, and deposited into the corporation's account at the Merrimack Valley National Bank. (Ex. 83; Tr. 1514-1517.)

The following withdrawals were made by check from that account (Ex. 85):

Name of The Payee	*Amount*
Simmers	$18,000.00
Gordon	2,500.00
Gordon and Simmers (2 cashier's checks @ $5,000)	10,000.00
Gordon	700.00
Simmers	700.00
The Schoolhouse, Inc.	78.80
Cash (Simmers & Gordon)	800.00
Cash (Simmers & Gordon)	2,500.00
Simmers	10,000.00
Total	$45,278.80

There was no evidence concerning the further disposition of any of that money or of any of the money remaining in that account. No other payments were made by The Foundation Company for or on account of its so-called sub-contract with the Granite State Realty & Construction Co., Inc., which had performed no work on, and had furnished no equipment or supplies for, the Boston Common Garage Project. (Tr. 1453-1455.)

None of the Authority members or employees or agents thereof testified that he relied on the truth of any of the representations made by any of the defendants or by Brady or anyone else. Nor was there any evidence that either Simmers or Gordon had participated in any act or conversation or was even mentioned by anyone prior to March 24, 1960, or that any of the money allegedly stolen was ever in Massachusetts.

During the course of the trial, the petitioners Gordon and Simmers saved exceptions to (1) the denial of their motions that they be given an opportunity to inspect a particular portion of the transcript of the grand jury proceedings (Tr. 1171), (2)the failure carefully and clearly to limit hearsay declarations at the time of their admission and to instruct the jury as to the limitations to be put upon such declarations, (3) the admission of a series of checks and requisitions (Exs. 62, 63), offered for the purpose of establishing that the Authority had a general or special interest in, or actual or constructive possession of, the money allegedly stolen (Tr. 1187-1188), (4) the denial of their motions for directed verdicts of not guilty filed at the conclusion of all the evidence (Tr. 1784-1786), and (5) the

trial judge's instructions to the jury and his refusal to grant certain requested instructions[10] (Tr. 2001-2007).

On April 16, 1963, the jury returned verdicts of guilty in both indictments against the petitioners and against Kiernan.

On April 22, 1963, each was sentenced to be imprisoned: under Indictment No. 4018 of 1962 (No. 8185 of 1964), for not more than three and not less than two and one-half years in the Massachusetts Correctional Institution, Walpole, and under Indictment No. 4020 of 1962 (No. 8187 of 1964), for two and one-half years in the House of Correction, the sentences under No. 4020 of 1962 (No. 8187 of 1964) to take effect from and after the sentences imposed under No. 4018 of 1962 (No. 8185 of 1964). Execution of the sentences was stayed pending appeal.

On April 24, 1963, the petitioners Gordon and Simmers filed their claims of appeal.

On October 5, 1964, the Supreme Judicial Court of Massachusetts affirmed the convictions. On October 8, 1964, and on October 27, 1964, the Supreme Judicial Court denied petitions for rehearing. (Appendix E, *infra*, pp. 74-78.)

On October 13, 1964, The Superior Court revoked the stays of execution of sentence, and petitioners have since been incarcerated. On October 14, 1964, the Supreme Judicial Court denied petitions for stays of execution pending action by this Court. On November 16, 1964, Justice Goldberg of this Court denied petitioners' applications for stays pending action by this Court.

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[10] At the conclusion of the evidence, the court, on motion of Simmers, Gordon and Kiernan, directed the return of verdicts of not guilty on indictment No. 4021 of 1962, charging all three with conspiracy to extort and on indictment No. 4022 of 1962, charging Kiernan with extortion; and struck all evidence specifically limited to those indictments. (Tr. 1620-1623.)

Reasons for Granting the Writ

I. The Petitioners' Rights to Due Process of Law Under the Fourteenth Amendment Were Denied Because the Commonwealth Did Not Ensure That the Grand Jury That Indicted Them Was Free From Bias and Prejudice When There Had Been Substantial Prejudicial Pre-Indictment Publicity in Large Part Stimulated by Officials of the Commonwealth.

This is substantially the same question as the first question upon which this Court granted certiorari in *Beck* v. *Washington,* 365 U.S. 866, 82 S. Ct. 955, although the majority of the Court found it unnecessary to reach the question after argument. 369 U.S. 541. The Court said:

> "It may be that the Due Process Clause of the Fourteenth Amendment requires the State, having once resorted to a grand jury procedure, to furnish an unbiased grand jury. [Citations omitted.] But we find that it is not necessary for us to determine this question; for even if due process would require a State to furnish an unbiased body once it resorted to grand jury procedure—a question upon which we do not remotely intimate any view—we have concluded that Washington, so far as is shown by the record, did so in this case." 369 U.S. at 546, 82 S. Ct. at 958.

The major distinction between the case at hand and the *Beck* case is that here petitioners were denied the right to prove that the grand jury that indicted them was prejudiced (R. 78, 79) because, unlike the State of Washington, the Commonwealth of Massachusetts does not require an unbiased grand jury.

In *Commonwealth* v. *Woodward,* 157 Mass. 516, 518-519,

32 N.E. 939, 940, the Supreme Judicial Court held that, "It is not . . . necessary that each grand juror shall be free from bias or prejudice, provided he has the general qualifications which are required." That statement was cited with approval in *Commonwealth* v. *Geagan*, 339 Mass. 487, 498, 159 N.E. 2d 870, *cert. den.* 361 U.S. 895, 80 S. Ct. 200, *habeas corpus den. Geagan* v. *Gavin*, 292 F.2d 244 (1st Cir.), *cert. den.* 370 U.S. 903, 82 S. Ct. 1297, the case upon which the Supreme Judicial Court relied to uphold the convictions in this case. 1964 Mass. Adv. Sh. at 1156-1157, 201 N.E. 2d at 506, Appendix A, pp. 1156-1157, *infra*.

The question in this case, therefore, cannot be disposed of as it was in the *Beck* case. Here, the policy in Massachusetts is that a grand jury need not be fair. Therefore, the Commonwealth provided no procedure whereby the petitioners could prove bias. In the *Beck* case, on the other hand, the State provided a *voir dire* proceeding. Two of the prospective grand jurors who admitted prejudice were excused. Three others whose background indicated possible prejudice were excused. No grand juror personally knew Beck or was shown to be adverse to the institutions with which he was generally identified. 369 U.S. at 546-549, 82 S. Ct. at 958-959.

In the *Beck* case, the State of Washington took measures to ensure that the grand jury would be unbiased. Here there was no such procedure. The question here is not whether the Commonwealth's procedures for securing a grand jury were fair, but whether the Commonwealth may ignore the question of fairness completely.

Although the question was not directly answered in the *Beck* case, prior cases indicate what the answer must be. First of all, the judicial construction that the Fourteenth Amendment does not necessarily require state prosecutions to be instituted by indictments of grand juries, *Hurtado* v. *State of California*, 110 U.S. 516, 4 S. Ct. 111; *Kennedy* v.

Walker, 337 U.S. 901, 69 S. Ct. 1046, has never deterred this Court from setting aside a state court conviction solely on the ground that it was commenced by an indictment returned by a grand jury from which Negroes had been intentionally excluded. *Pierre* v. *State of Louisiana*, 306 U.S. 354, 59 S. Ct. 536; *Hill* v. *State of Texas*, 316 U.S. 400, 62 S. Ct. 1159; *Cassell* v. *State of Texas*, 339 U.S. 282, 70 S. Ct. 629; *Reece* v. *State of Georgia*, 350 U.S. 85, 76 S. Ct. 167; *Michel* v. *State of Louisiana*, 350 U.S. 91, 76 S. Ct. 158; *Eubanks* v. *State of Louisiana*, 356 U.S. 584, 78 S. Ct. 970. Nor has the Court been reluctant to set aside a state court conviction because of unfair appellate procedures, even though the Fourteenth Amendment has never been construed to require a state "to provide appellate courts or a right to appellate review at all." *Griffin* v. *People of the State of Illinois*, 351 U.S. 12, 18, 76 S. Ct. 585, 590; *Eskridge* v. *Washington State Board of Prison Terms and Paroles*, 357 U.S. 214, 78 S. Ct. 1061; *Burns* v. *State of Ohio*, 360 U.S. 252, 79 S. Ct. 1164; *Douglas* v. *Green*, 363 U.S. 192, 80 S. Ct. 1048. Thus it seems clear that the Fourteenth Amendment protects persons like petitioners from all sorts of invidious acts at every stage of the proceedings—from the very beginning to the end—even during a stage not required by constitutional due process. As a matter of fact, in *Frank* v. *Mangum*, 237 U.S. 309, 35 S. Ct. 582, the Court said, 237 U.S. at page 327, 35 S. Ct. at 587, "(W)hile the 14th Amendment does not require that a State shall provide for an appellate review in criminal cases . . . , it is perfectly obvious that where such an appeal is provided for, . . . the proceedings in the appellate tribunal are to be regarded as a part of the process of law under which (the prisoner) . . . is held in custody by the State, and to be considered in determining any question of alleged deprivation of his life or liberty contrary to the 14th Amendment."

Second, this Court has already rejected, as a reason for upholding an indictment returned by a grand jury from which Negroes had been excluded, the argument that " 'the Constitutional rights of the defendant (are) . . . not affected by reason of the fact that persons of the Colored . . . race are not placed on the Grand Jury because . . . the mere presentment of an indictment is not evidence of guilt . . . it simply informs the court of a commission of a crime and brings the accused before the court for prosecution' ". In spurning that argument, this Court noted that the Louisiana constitution provided that "no person shall be held to answer for capital crime unless on a presentment or indictment by a grand jury, . . ."; and that the Louisiana law prohibits the exclusion of qualified Negroes from service on grand and petit juries. *Pierre* v. *State of Louisiana*, 306 U.S. 354, 356-358, 59 S. Ct. 536, 538. Similarly, in Massachusetts, the general rule is that no person shall be held to answer for a felony unless upon indictment by a grand jury, art. 12 of the Declaration of Rights of the Massachusetts Constitution; *Jones* v. *Robbins*, 74 Mass. (8 Gray) 329; *DeGolyer* v. *Commonwealth*, 314 Mass. 626, 627, 51 N.E. 2d 251, 252; and it is unlawful for a prosecutor to "attempt to influence the grand jurors in the performance of their duties," *Attorney General* v. *Pelletier*, 240 Mass. 264, 307-310, 134 N.E. 407, 419-420. In Massachusetts, as in Louisiana, the guarantee of indictment by a properly constituted grand jury is a basic safeguard.

Third, all of the arguments that there is no federal constitutional right to a fair grand jury so long as the accused receives a trial by a fair petit jury must have been considered and rejected in *Cassell* v. *State of Texas*, 339 U.S. 282, 70 S. Ct. 629. It is true, of course, that the rejection of that argument occurred in a case in which a state indictment was attacked by a Negro defendant because of the intentional exclusion of Negroes from the grand jury.

Nevertheless, the reason for such rejection is equally valid here. Moreover, the danger of the return of a groundless indictment against an innocent person is at least as great in the case of a grand jury prejudiced because of publicity as it is in the case of a jury prejudiced because of race.

Fourth, the Fifth Amendment to the federal constitution not only requires federal prosecutions for serious crimes to be instituted by indictment, but also guarantees due process of law to all federal prisoners. It must have been the due process clause of that amendment which this Court had in mind in *Costello* v. *United States,* 350 U.S. 359, 363, 364, 76 S. Ct. 406, 409; *Lawn* v. *United States,* 355 U.S. 339, 349, 78 S. Ct. 311, 317, when it said in effect that the Fifth Amendment calls for an indictment returned not only by a legally constituted grand jury, but also by an unbiased grand jury.

Moreover, Mr. Justice Black, with whom Chief Justice Warren and Mr. Justice Douglas concurred, spelled out the constitutional right in a dissent in *Michel* v. *State of Louisiana,* 350 U.S. 91, 76 S. Ct. 158. There he said at pages 102-104 of 350 U.S., 76 S. Ct. at 165-166, that every person has a constitutional right "*to have the charges against (him) . . . considered by a fair and legal grand jury*". Every person has the "*federally guaranteed right to have his case considered by an unpacked grand jury*". No person can be constitutionally convicted "*until after adequate notice and a fair trial on an indictment returned by a fair grand jury selected without regard to race or color*". "*Under our system even a bad man is entitled to have his case considered at every stage by a fair tribunal.*" (Italics Supplied.) Although Mr. Justice Black was discussing at one point federal prosecutions, what he said applied to both state and federal prosecutions.

Furthermore, if the Due Process Clause in the Fifth Amendment requires an unbiased grand jury, then the Due

Process Clause of the Fourteenth Amendment imposes the same requirement. For, as Mr. Justice Frankfurter said in a concurring opinion in *Malinski* v. *People of State of New York*, 324 U.S. 401, 415, 65 S. Ct. 781, 788, "to suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection."

Fifth, several Justices of this Court have recognized that every person has a right, guaranteed by the Fourteenth Amendment, to have the state charges against him, if presented to a state grand jury, considered by a fair and impartial grand jury.

In *Cassell* v. *State of Texas*, 339 U.S. 282, 70 S. Ct. 629, the state court's conviction of Cassell, a Negro, was reversed because the number of Negroes selected for grand jury duty had been intentionally limited in approximate proportion to the number of Negroes eligible for grand jury service. Realizing, no doubt, that it would be difficult logically to support reversal under the equal protection clause, for, if anything, selection on that basis would tend to provide mathematically equal treatment, Mr. Justice Reed commenced his opinion, concurred in by Chief Justice Vinson and Justices Black and Clark, by stating, "*Review was sought in this case to determine whether there had been a violation by Texas of petitioner's federal constitutional right to a fair and impartial grand jury*". (Italics supplied.) Mr. Justice Jackson also must have considered the issue to be the petitioner's constitutional right to an impartial grand jury, for, in his dissent, he argued unsuccessfully that since Cassell had been convicted by a fair trial jury, he could not possibly have been prejudiced by the grand jury and he, therefore, had no right to an impartial grand jury.

In *Michel* v. *State of Louisiana*, 350 U.S. 91, 102, 76 S. Ct. 158, 165, where this Court held that two of the petitioners

had waived their constitutional rights by not seasonably challenging the composition of the grand jury indicting them, and that the third petitioner had forfeited his constitutional right by fleeing from the State and remaining away until long after the expiration of the time allowed by state law to challenge the validity of the grand jury, the three dissenters, Mr. Justice Black, joined by Mr. Chief Justice Warren and Mr. Justice Douglas, criticized the majority for holding that, because the petitioners had failed to make a timely challenge to the composition of the grand jury indicting them, they waived 'their constitutional and statutory rights to have the charges against them considered by a fair and legal grand jury". In doing so, the dissenters, of course, recognized the federally guaranteed right to an unbiased grand jury.

In *Beck* v. *Washington*, 369 U.S. 541, 82 S. Ct. 955, Justice Douglas reiterated his position, 369 U.S. at 579, 82 S. Ct. at 975 (dissenting opinion), and the Chief Justice and Justice Black indicated that their views were the same, 369 U.S. at 558, 82 S. Ct. at 964 (dissenting opinion).

Thus it is seen from the *Beck, Cassell* and *Michel* cases, that at least seven Justices of this Court, including four of the present members, have said, or have joined in saying in one way or another, that every person has the right, guaranteed by the Fourteenth Amendment, not to be indicted by a prejudiced state grand jury.

Finally, the notion that a prosecutor may purposely prejudice a state grand jury with complete constitutional immunity is certainly a concept that is foreign to our standards of decency and fairness. As was said in *Costello* v. *United States*, 350 U.S. 359, 362, 76 S. Ct. 406, 408, the very purpose of the grand jury procedure is "to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes."

Its object, according to *Stirone* v. *United States*, 361 U.S.

212, 218, 80 S. Ct. 270, 273, is to limit a person's jeopardy "to offences charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge". It was "designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity". *Ex parte Bain*, 121 U.S. 1, 11, 7 S. Ct. 781, 786. See also *Costello* v. *United States*, 350 U.S. 359, 362, 76 S. Ct. 406, 408; 2 Wharton, *Criminal Procedure* (1918) 1757; 38 C.J.S. 983. In *Jones* v. *Robbins*, 74 Mass. (8 Gray) 329, 344, Chief Justice Shaw said: "The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial, before a probable cause is established by the presentment and indictment of a grand jury, in case of high offenses, is justly regarded as one of the securities to the innocent against hasty, malacious and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty." See also to the same effect *Attorney General* v. *Pelletier*, 240 Mass. 264, 307-310, 134 N.E. 407, 419-420; *DeGolyer* v. *Commonwealth*, 314 Mass. 626, 627, 51 N.E. 2d 251, 252; *Blake* v. *State*, 54 Okla. Cr. 62, 67-70, 14 P. 2d 240, 242-243.

Moreover, the jealousy with which the safeguard has been sedulously preserved is well demonstrated by the following cases in each of which the conviction was reversed because of the prosecutor's influence upon the deliberations of the grand jury. *Williams* v. *State*, 188 Ind. 283, 303-307, 123 N.E. 209, 216-217; *State* v. *Crowder*, 193 N.C. 130, 136 S.E. 337; *Blake* v. *State*, 54 Okla, Cr. 62, 14 P. 2d 240; *Hammers* v. *State, Okla.*, 337 P. 2d 1097. See also *Attorney General* v. *Pelletier*, 240 Mass. 264, 307-310, 134 N.E. 407, 419; 38 C.J.S. 1042.

In the instant case, the headlines printed in the Summary of the Record (R. 40-44, 80-90, 159-162) show that the publicity emanated from the office of the Attorney General. Whether or not it was actually intended to prejudice potential grand jurors, it certainly could not have helped but produce that result. Where the prosecution has in its control the determination whether there will be publicity that may be prejudicial to potential defendants, the State ought to be held to higher standards than where the publicity was spontaneous and unavoidable.

For all of the foregoing reasons, petitioners believe that a person under investigation by a grand jury "is as much entitled to the just, impartial and unbiased judgment of that body as he is to that of the petit jury on his final trial," 24 *Am. Jur.* 861; and petitioners believe that a person who has been indicted by a state grand jury, prejudiced by substantial publicity, unchecked by any procedure for ensuring its fairness, has been denied the due process of law guaranteed him by the Fourteenth Amendment to the Federal Constitution.

II. The Petitioners' Rights to Due Process of Law Under the Fourteenth Amendment Were Denied Because the Trial Judge Did Not Ensure that the Petit Jury Was Free from Bias and Prejudice When There Had Been Substantial Prejudicial Pre-Indictment Publicity in Large Part Stimulated by Officials of the Commonwealth.

Under Chapter 234, section 28, of the Massachusetts General Laws (Ter. Ed.), the trial court *may* allow a *voir dire* examination of the prospective petit jurors by counsel, but need not. If the court does not allow counsel to conduct an examination, it must (on motion of either party) itself examine each prospective juror to learn: (1) "whether he

is related to either party," or (2) "whether he has any interest in the case," or (3) whether he "has expressed or formed an opinion," or (4) whether he "is sensible of any bias or prejudice, therein."

Whether any but the four questions be asked "rests wholly in the discretion of the judge." 1964 Mass. Adv. Sh. at 1159, 201 N.E. 2d at 508, Appendix A p. 1159, *infra*. "Seldom is it [the *voir dire* examination] permitted to extend beyond the statutory questions." *Commonwealth* v. *Di Stasio*, 294 Mass. 273, 280, 1 N.E. 2d. 189, 194.

Where a State does not provide a procedure for ensuring a fair grand jury—and, indeed, does not require a grand jury to be free of bias or prejudice or to proceed on competent evidence, see discussion, Part I, *supra*—the State must be doubly careful to provide an adequate procedure for ensuring a fair petit jury.

Forty States have given a defendant in a criminal case the right to conduct a *voir dire* examination of prospective jurors. See Appendix D hereto, *infra*, pp. 62-69. The nine other States, while withholding from a defendant the right to conduct the *voir dire* examination, appear either by statute or by practice to require the trial judge to ask relevant questions submitted by counsel (Appendix D hereto, *infra*, pp. 69-73.)

In the federal courts, the rule, as stated in the Rules of Criminal Procedure,[11] is similar to the Massachusetts statute. But in each of the following cases, the judgment of the lower court was reversed because the trial judge,

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[11] Rule 24(a) of the *Federal Rules of Criminal Procedure* provides: "The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper."

who conducted the *voir dire* examination of jurors, refused to ask material questions proposed by counsel. *Morford* v. *United States*, 339 U.S. 258, 70 S. Ct. 586; *Aldridge* v. *United States*, 283 U.S. 308, 51 S. Ct. 470; *Sellers* v. *United States*, D.C. Cir., 271 F.2d 475; *Frasier* v. *United States*, 1 Cir., 267 F.2d 62. For further evidence of the universal belief in the federal courts that fairness requires an extensive *voir dire* examination of jurors in an appropriate case, see *United States ex rel. Darcy* v. *Handy*, 351 U.S. 454, 76 S. Ct. 965; *Holt* v. *United States*, 218 U.S. 245, 31 S. Ct. 2; *Reynolds* v. *United States*, 98 U.S. 145, 25 Law Ed. 244; *United States* v. *Clancy*, 7 Cir., 276 F.2d 617; *Wagner* v. *United States*, 9 Cir., 264 F.2d 524, *cert. denied*, 360 U.S. 936, 79 S. Ct. 1459; *Spells* v. *United States*, 5 Cir., 263 F.2d 609, *cert. denied*, 360 U.S. 920, 79 S. Ct. 1439; *Chavez* v. *United States*, 10 Cir., 258 F.2d 816, *cert. denied*, 359 U.S. 916, 79 S. Ct. 592; *Judich* v. *United States*, 5 Cir., 214 F.2d 950; *Delaney* v. *United States*, 1 Cir., 199 F.2d 107; *Paschen* v. *United States*, 7 Cir., 70 F.2d 491, 495. Massachusetts, on the other hand, is the only state which in practice not only denies a defendant the opportunity to conduct a *voir dire* examination of prospective jurors, but sanctions, as within the powers of discretion, the limitation of the questions put by the trial judge to those required by statute.

The trial judge here did in some instances ask questions in addition to the four required by the statute. The Supreme Judicial Court held that, "In all respects the judge was meticulous to insure the empanelling of a jury free from bias." 1964 Mass. Adv. Sh. at 1159, 201 N.E. 2d at 508, Appendix A *infra*, p. 1159.

Petitioners believe, however, that an examination of the questions put to prospective jurors by the trial judge reveals that the questioning was at best superficial. Certainly it was not designed to, and could not, bring to light any hidden bias or prejudice harbored by a venireman,

instilled by the pre-trial publicity. See *Irvin* v. *Dowd*, 366 U.S. 717, 81 S. Ct. 1639.[12]

The trial judge, in fact, went beyond the statutory questions rarely, except in inquiring whether the prospective juror's health would interfere with his ability to serve.

Fortunately, the record provides an example of the importance of questioning the veniremen closely as to the effect that publicity has had on them, as counsel requested. (Tr. pp. 123-127.) Juror No. 385, Joseph Shulman, answered three of the four questions negatively. In addition, there appeared the following:

> "Q. Are you conscious or aware of the existence of any bias or prejudice on your part as to any of these three defendants?
>
> "A. No, I do not have any personal bias except what I have read in the newspaper."

The court then questioned the venireman more closely and discovered that he showed evidence of bias. The importance of this example is that had the juror not volunteered an answer not responsive to the question, his bias would never have been uncovered. The importance of the questions requested by petitioners' counsel as to the veniremen's exposure to publicity is thus demonstrated.

By refusing permission for petitioners to conduct the *voir dire* examination, and refusing to ask the questions listed in petitioners' motions for questions to each prospective juror, the trial judge precluded any adversary inquiry on a vital issue which he had to decide fairly if petitioners were to have a fair trial. Because the question of whether each juror was impartial was not tried "like any other issue of that character," the trial judge himself

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[12] In the *Irvin* case, the defendant had the right, which he exercised, to examine jurors directly.

was duty bound to ask such questions as would seek fairly to elicit whether the jurors were actually able to "exclude even the unconscious influence of (their) . . . preconceptions as to probable guilt, engendered by a pervasive pre-trial publicity." Instead, the questions which he asked merely sought to elicit whether the jurors thought they could be fair. "No doubt each juror was sincere when he said that he would be fair and impartial to petitioner(s), but psychological impact requiring such a declaration before one's fellows is often its father." *Irvin* v. *Dowd*, 366 U.S. 717, 728, 81 S. Ct. 1639, 1645.

The trial judge effectively denied petitioners the opportunity to prove bias. He barred them from attempting to prove what they had contended from the very beginning —that the prosecutors had issued, caused and stimulated substantial prejudicial pre-trial publicity, calculated and tending to convince the petit jury of petitioners' guilt, and to arouse that petit jury's animosity, indignation and prejudice towards and against petitioners. And he made no real effort to prove or put to rest their contention. Possibly, he thought that an expeditious *voir dire* examination was desirable and that it would be detrimental to the administration of criminal justice in Massachusetts to spend the time necessary for the type of *voir dire* examination sought by petitioners. But, as was said in *Aldridge* v. *United States*, 283 U.S. 308, 315, 51 S. Ct. 470, 473, "we think it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. *No surer way could be devised to bring the processes of justice into disrepute.*" (Italics supplied.) For just as the "*preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial trial*", *Dennis* v. *United States*, 339 U.S. 162, 171-172, 70 S. Ct. 519, 523, *so*

must the denial of such an opportunity constitute a denial of a fair trial, Cf. Morford v. *United States*, 339 U.S. 258, 70 S. Ct. 586. (Italics Supplied.)

The trial judge in the instant case denied petitioners the opportunity to prove bias and he himself asked few and unimaginative questions of the impanelled jurors. He was content in the belief that the standards imposed by the federal constitution would sanction conclusions of impartiality based upon a pedestrian examination in which petitioners' counsel were barred from participating. In petitioners' view, such an examination was constitutionally inadequate for determining whether the impanelled jurors were in fact impartial and indifferent; and its effect was to deny petitioners the due process of law guaranteed by the Fourteenth Amendment.

III. It Was a Violation of the Constitution of the United States for the Commonwealth to Convict Petitioners for Larceny When the Evidence Showed that the Larceny Was Committed Outside the Territorial Boundaries of the Commonwealth, Within the Jurisdiction of the State of New York.

The indictment returned against petitioners charging them with larceny, charged a larceny under Mass. G. L. (Ter. Ed.) C. 266, s. 30. The Government later filed a Bill Of Particulars specifying that the larceny was accomplished by means of false pretences.

The venue statute for general larceny is Mass. G. L. (Ter. Ed.) C. 277, s. 58, which provides that venue may lie, "in any county where the defendant had possession of the property alleged to have been stolen." There is another statute, C. 277, s. 59, which provides: "The crime of obtaining money . . . by a false pretence . . . may be alleged to have been committed, and may be prosecuted and

punished, in any county where the false pretence was made, written or used . . . by the defendant."

In 1905, the Supreme Judicial Court held that venue of an offense charged under the general larceny statute, as here, was governed solely by section 58. *Commonwealth* v. *Friedman*, 188 Mass. 308, 74 N.E. 464. Petitioners argued below that their motions for directed verdict should have been granted since: "In the instant case, the necessary asportation took place, and the larceny . . . was complete . . . in New York"; the money lost its identity when mingled in New York; and that even after the mingling, there was no evidence that the money ever found its way to Suffolk County or was possessed by petitioners in Suffolk County.[13] The Supreme Judicial Court, after fifty-nine years, reversed *Commonwealth* v. *Friedman*, 1964 Mass. Adv. Sh. at 1175-1177, 201 N.E. 2d at 517-518, Appendix A *infra*, pp. 1175-1177.

As a result of the new ruling, petitioners were convicted on the evidence that they had made false representations in Suffolk County, Massachusetts, with the intent to defraud (1964 Mass. Adv. Sh. at 1177-1178, 201 N.E. 2d at 518-519, Appendix A *infra*, pp. 1177-1178). But making false representations with intent to defraud is not a crime in Massachusetts. Petitioners were charged with and convicted of larceny, and the evidence was clear that the larceny took place in the State of New York.

There is a very clear line of cases defining when a sovereignty may take jurisdiction of a larceny. Each case has determined that jurisdiction lies in any place in which the thief has possession of the stolen property. The basis for this rule is that each moment of possession constitutes a new trespass against the original owner—a new asportation. *Commonwealth* v. *Andrews*, 2 Mass. 14, 21-23 (Opinion of Sedgwick, J.), 23-24 (Opinion of Dana, C. J.) (1806);

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[13] Brief of Defendants Richard C. Simmers and Richard K. Gordon, pp. 34-36.

Commonwealth v. *Beaman*, 8 Gray (74 Mass.) 497 (1857), and cases cited therein; *Commonwealth* v. *Uprichard*, 3 Gray (69 Mass.) 434 (1855), and cases cited therein.

This theory, then, depends upon the thief's having in his possession the *identical* property stolen. *Commonwealth* v. *Beaman*, *supra*, and cases cited therein; *State* v. *Hedrick*, 272 Mo. 502; *Rainwater* v. *State*, 155 Miss. 684; *Grant* v. *State*, 42 Tex. Cr. 273; *Ballow* v. *State*, 42 Tex. Cr. 261, 263; 22 *C.J.S.*, Criminal Law s. 185 (18).

It is clear that in this case the property stolen lost its identity on March 2, 1960, when the $450,000.00 check was deposited in the account of the Foundation Company in the Chase Manhattan Bank in New York. *Accord*, *Burton* v. *United States*, 196 U.S. 283, 25 S. Ct. 243. No part of the proceeds of the original check could conceivably have reached Massachusetts before March 31, 1960, twenty-nine days later. Therefore, the larceny, for purposes of jurisdiction at least, took place in New York where the only trespass and asportation took place.[14]

This is not a case in which the petitioners can go free simply by stepping across the border to complete their crime. Compare *Commonwealth* v. *Welch*, 345 Mass. 366, 187 N.E. 2d 813 (1963). This is true, first, because they can be prosecuted in New York for larceny, second, because Massachusetts could well have outlawed the making

[14] The court below held that the Foundation Company served as a "cache" and a "conduit for the distribution of the funds", and that petitioners "accomplished with animus furandi the asportation of the funds both in New York and in Massachusetts." 1964 Mass. Adv. Sh. at 1172-1173, 201 N.E. 2d at 515-516, Appendix A *infra*, pp. 1172-1173. However, this was in connection with the point that the principal crime was not complete until the original plan was fully carried out. It was not in connection with the jurisdictional question. It should be noted that the last payment involved was a check dated March 31, 1961, more than one year after the original asportation, and that $140,000 of the proceeds of the $450,000 check was kept by the Foundation Company.

of false representations with intent to defraud if it had chosen to do so, and, third, because they were in fact convicted of conspiracy to commit larceny.

Although there is little direct law on this subject, it seems obvious that only chaos would result were states permitted to exercise police power over the territory of other states.[15] This is at least implicit in Article IV, section 2, clause 2 of the Constitution:

> "A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed *to the State having jurisdiction of the Crime.*" (Emphasis added.)

The necessary inference to be drawn is that the State of refuge does not have jurisdiction of the crime committed in another State. This principle must have been recognized by the courts deciding the *Andrews, Beaman, Hedrick, Rainwater, Grant,* and *Ballow* cases, *supra.* See also *Magnolia Petroleum Co.* v. *Hunt,* 320 U.S. 430, 440, 64 S. Ct. 208, 214; *Home Insurance Co.* v. *Dick,* 281 U.S. 397, 50 S. Ct. 338; *New York Life Ins. Co.* v. *Head,* 234 U.S. 149, 34 S. Ct. 879.

Perhaps the earliest recorded expression of this principle in the United States was in the argument of one Otis, counsel for defendant, in *Commonwealth* v. *Andrews,* 2 Mass. 14, at 15 (1806). The principle was accepted by implication in that case and in *Commonwealth* v. *Beaman,* 8 Gray (74 Mass.) 497 (1857).

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[15] "Laws to punish crimes are essentially local, and limited to the boundaries of the state prescribing them." *Commonwealth* v. *Uprichard, supra,* 3 Gray at 439. And see *Commonwealth* v. *Holder,* 9 Gray (75 Mass.) 7, 11 (dissenting opinion) (1857).

The *Beaman* case should have been controlling here. In that case, the defendant was charged with larceny of a peahen and a turkey. The court held that "the jury should have been instructed, as the defendants requested, 'that if the said fowls were alive when originally taken, from the possession of the owner in Connecticut, and were killed before being brought into this state, the defendants could not be convicted of stealing them in this state.'" 8 Gray at 499. When the property changed in identity, the asportation ceased (the court also held that live fowl were distinct from dead fowl), and no larceny took place in Massachusetts.

The court in the *Beaman* case must have decided that for purposes of jurisdiction the scope of the plot was irrelevant—only the places of trespass.

The crime charged was larceny. The larceny occurred in New York. The Massachusetts legislature could have made it a crime to make false pretences with intent to defraud, but it did not do so. To convict petitioners of the crime of making false pretences with intent to defraud would have violated the *ex post facto* clause of Article I, section 10, clause 1, of the Constitution. To convict them of larceny violated Article IV, section 2, clause 2.

Although petitioners in their brief below cited the *Beaman* case, and pointed out that the evidence showed that the larceny took place in New York, petitioners did not pursue this argument fully in the Court below because it was not relevant. Under *Commonwealth* v. *Friedman*, petitioners' convictions would have had to be reversed.[16] Certainly,

[16] It is clear that the Government's other arguments on this point were not accepted by the court. First, its argument that this prosecution was under c. 266, s. 33 (1) was countered by the court's saying that it was under section 30. 1964 Mass. Adv. Sh. at 1176, 201 N.E. 2d at 517, Appendix A, *infra*, p. 1176. Second, had the court been able to decide for the Government without reversing such a long-established case, it certainly would have done so.

petitioners were not required to argue against the overruling of each case which supported their position in order to save their rights. This is true especially since in Massachusetts the Government has no right to appeal in criminal cases.[17] *Commonwealth* v. *Cummings*, 3 Cush. (57 Mass.) 212 (1849). In addition, the court below did consider this point, and rejected it, when it considered and rejected petitioners' petition for rehearing of October 20, 1964. (Appendix E *infra*, pp. 74-78.)

IV. It Was a Violation of Petitioners' Constitutional Rights for the Court Below to Uphold Their Conviction by Overruling a Long-Established Rule of Law.

Had the court below not overruled *Commonwealth* v. *Friedman*, 188 Mass. 308, 74 N.E. 464 (1905), petitioners could not have been convicted of larceny in Massachusetts.

In *Calder* v. *Bull*, 3 Dall. 386, 1 L. Ed. 648, Justice Chase said that one of the four categories of violations of the *ex post facto* clause includes, "every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender." In this case, prior to the decision of the court below, it was necessary for the evidence to show possession of the stolen property in Massachusetts, *Commonwealth* v. *Beaman*, 8 Gray (74 Mass.) 497 (1857), and in Suffolk County, *Commonwealth* v. *Friedman*, 188 Mass. 308, 74 N.E. 464 (1905). The decision of the court below made such evidence un-

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[17] It is ironic that had the trial judge, who recognized that *Commonwealth* v. *Friedman* was controlling, granted petitioners' motions for directed verdicts as he properly should have done on the state of the evidence, the Government could not have raised this point at all.

necessary. The court held that the decision in the *Friedman* case (and, by implication, that in the *Beaman* case) was incorrect, and that the evidence need only show the making of a false pretence in Suffolk County. That the decision of a court can amount to *ex post facto* law-making was affirmed in *Bouie* v. *City of Columbia*, 378 U.S. 347, 84 S. Ct. 1697. And the fact that the court merely "corrected" an earlier decision should make no difference. From 1905 to 1964 the law was that of the *Friedman* case. And the change was clearly not foreseeable.

In *Gut* v. *State of Minnesota*, 9 Wall. 37, the Court held that a change of venue did not constitute an *ex post facto* law. However, it was clear from the facts of that case that no substantial harm was done to the defendant by that change. And in *Cook* v. *United States*, 138 U.S. 157, 183, 11 S. Ct. 268, 275, the Court held that the change in venue was not a violation of the *ex post facto* clause when it merely changed the district in which trial was to be held, and when both the prior and new districts were within the jurisdiction of the same government. And no harm was shown to have been done to defendant by the change.

In *Beazell* v. *State of Ohio*, 269 U.S. 167, 46 S. Ct. 68, the court said that there are alterations of procedure that "will be held to be of sufficient moment to transgress the constitutional prohibition." 269 U.S. at 171, 46 S. Ct. at 69. Here, not only is there substantial harm to the defendant by the change of the venue rule, but in addition there is the change of jurisdictional requirement. This was not a question of in which county in Massachusetts venue lay, but whether venue lay in Massachusetts at all.

Moreover, the change in law, occurring not only after the alleged offense, but after trial, deprived petitioners of a fair trial. Trial counsel, believing that the Government had to prove possession in Suffolk County, may well have conducted his case in a substantially different manner had

the new rule been in effect at that time. Petitioners should at least be awared a new trial for that reason. Changing the governing rule of law after trial constituted a denial of due process of law under the Fourteenth Amendment as well as a violation of the *ex post facto* clause of the Constitution.

V. The Court Below Violated Petitioners' Rights Under the Ex Post Facto Clause of the Constitution, and Their Constitutional Rights to Due Process of Law by Affirming Their Convictions When There Was Insufficient Evidence to Prove the Charges Against Them.

A. *The Charge Was In Reality Accepting A Bribe For Which Petitioners Could Not Be Constitutionally Convicted*

This was a case in which the head of the Massachusetts Parking Authority received a kickback from the contractor who received the contract to build the parking garage under the Boston Common. Were the Authority a private corporation, this would have constituted a breach of fiduciary duty. But since the Authority was a public body, it constituted accepting a bribe. A public official who was guilty of accepting a kickback would normally have been prosecuted under the bribery statute. Mass. G.L. (Ter. Ed.) C. 268, secs. 8, 9 (1961). (Appendix C *infra*, pp. 57-59.) However, either through legislative oversight or because the Authority was privately financed, the officials of the Authority could not be reached under the statutes as they then stood. The Massachusetts legislature has since amended the statutes to include such officials explicitly. Mass. St. 1962, C. 779, Mass. G.L. C. 268 A, ss. 1 *et seq.* (Appendix C *infra*, pp. 59-61.)

But since Brady's alleged conduct, with petitioners' alleged help, was so outrageous to public opinion, the Government here attempted to make the acceptance of a bribe into a larceny. Convicting petitioners at all when their "crime" was not included in C. 268, secs. 8, 9 (1961), was a violation of the *ex post facto* clause of the Constitution. The violation would have been obvious had the charge been brought specifically under those sections. The result should be no different merely because the charges were brought in the words of another statute.

A further result of this attempt was that the evidence did not quite fit the form into which the Government attempted to pour it, as the following sections demonstrate.

B. *There Was Insufficient Evidence To Prove That Petitioners Had Any Intent To Commit Larceny Or Joined In A Conspiracy To Commit Larceny.*

The court below held that,

> "Although the evidence as to Simmers and Gordon discloses no overt act by them until after First National, relying on the fraudulently induced requisition of the Authority, had transferred the $450,000 from the Authority's construction fund to Foundation, it shows that thereafter their roles, clearly inferable as being the result of careful prearrangement, were important in completing the larceny." 1964 Mass. Adv. Sh. at 1172, 201 N.E. 2d at 515, Appendix A *infra*, p. 1172.

The evidence does not support the conclusion of the court below. The evidence shows clearly that although the plot was carefully prearranged, petitioners' part in it was not prearranged. Quite to the contrary, petitioners were

brought in to replace Broderick, and the earliest date this could possibly have taken place was March 24, 1960, three weeks after the larceny took place.

At this point, the money was already in the hands of Foundation Company. Petitioners' part in the later transactions did not in any way require that they know how the Foundation Company received the funds. For all petitioners knew, they were participating in an extortion from Foundation Company or were helping Foundation Company take the payment of a bribe as a deduction from its federal income tax.

At any rate, there was no evidence that "the precise false pretences and representations charged in the indictment (were) . . . made with (their) . . . knowledge, concurrence and direction," *Commonwealth* v. *Harley*, 7 Metc. 462, 466 (Mass.), or that they were present when those false statements were made, *cf. Commonwealth* v. *Mannos*, 311 Mass. 94, 40 N.E. 2d 291, 300. Therefore, their convictions violated the due process clause of the Fourteenth Amendment. *Fields* v. *City of Fairfield*, 375 U.S. 248, 84 S. Ct. 360; *Garner* v. *Louisiana*, 368 U.S. 157, 82 S. Ct. 248; *Thompson* v. *Luisville*, 362 U.S. 199, 80 S. Ct. 624.

C. *There Was Insufficient Evidence To Prove That The Massachusetts Parking Authority Believed The Truth Of And Relied Upon The Allegedly False Statements.*

Essential for a conviction was proof beyond a reasonable doubt that the Authority relied upon the allegedly false statements "as true and parted with personal property as a result of such reliance." *Commonwealth* v. *Green*, 326 Mass. 344, 347-348, 94 N.E. 2d 260, 263; *Commonwealth* v. *Orler*, 252 Mass. 55, 59-60, 147 N.E. 548, 549.

First, the Authority parted with no property. It merely authorized the First National Bank to part with property. Had the Bank been the agent of the Authority, there would be no question. See *Commonwealth* v. *Call*, 21 Pick. 515, 520 (Mass.) But the Bank, acting as Trustee, had an interest adverse to that of the Authority and could not possibly be considered its agent.

The court below avoided this problem by changing the law once again. Instead of the requirement that "the person to whom [the false pretence] . . . was made . . . rely upon it as true and [part] . . . with personal property as a result of such reliance," the court substituted the law of Kentucky that as a result of the false pretence, money was obtained. 1964 Mass. Adv. Sh. at 1171-1172, 201 N.E. 2d at 515, Appendix A *infra*, pp. 1171-1172. No prior Massachusetts case can be found in which a court upheld a conviction for larceny of money the property of one person upon the basis of proof that another, not the agent of the first, parted with money in reliance upon the false pretences. This change in the law constituted a violation of the *ex post facto* clause of the Constitution.

In addition, the change constituted a denial of a fair trial, for petitioners' trial counsel might well have tried the case differently under the new ruling.

Second, the proof was insufficient to show that the Authority relied on any false statements at all. Although the knowledge of a faithless agent is not attributable to his principal, and an agent can defraud his principal, *Commonwealth* v. *Mulrey*, 170 Mass. 103, 106, 49 N.E. 91, there must be proof that the principal was indeed defrauded.

The Massachusetts Parking Authority was not a large organization. It would have been simple for the Government to put on the stand every one of its members (except, of course, the defendant Brady), agents and employees. But not one person connected with the Authority was asked

to testify as to whether he was deceived by the false statements and relied upon them.

In fact, all of the false statements were contained in documents signed by Brady and Kiernan and ratified or actually signed by the other two members of the Authority, the only persons who had the power to be deceived for the Authority. The result is the anomalous fact that it is those who made the statements who are said to be deceived by them.

Although the Authority has a theoretical existence apart from its members and employees, it cannot know, rely, or be deceived except through human beings. The Government offered no proof that anyone was so deceived. It cannot be said that this is the necessary implication from the fact that Requisition No. 1 was turned over to the Trustee. For the Authority was not itself defrauded by this payment. It was the bondholders or creditors of the Authority who were defrauded. And although it might be maintained that theoretically a corporate body cannot defraud itself, and so must have innocently relied on a false pretence, it cannot be maintained that a corporate body cannot defraud its creditors.

In addition, if any ability to know is to be attributed to the Authority, it must be admitted that the Authority must have known that no contractor would spend $450,000 before assurance that it would be awarded the contract. And knowing this, the Authority could not have been deceived.

Since there was insufficient evidence to prove this element of the offense, petitioners' convictions violated their rights under the due process clause of the Fourteenth Amendment. *Fields* v. *City of Fairfield*, 375 U.S. 248, 84 S. Ct. 360; *Garner* v. *Louisiana*, 368 U.S. 157, 82 S. Ct. 248; *Thompson* v. *Louisville*, 362 U.S. 199, 80 S. Ct. 624.

D. *There Was Insufficient Evidence to Prove That the Massachusetts Parking Authority Had Either Possession or Constructive Possession of, or a General or Special Property Interest in, the Money Allegedly Stolen*

In the absence of evidence that the Authority had "actual or constructive possession or the general or special property in" the money alleged to have been stolen, G.L. (Ter. Ed.) C. 278, s. 9, the petitioners' motions for directed verdicts of not guilty should have been granted. *E.g., Commonwealth* v. *Morse,* 14 Mass. 216, 217-218 (1817).

The court below held that the Authority had "a special property . . . in the construction fund." 1964 Mass. Adv. Sh. at 1173-1175, 201 N.E. 2d at 516-517, Appendix A *infra,* pp. 1173-1175. It is apparent, however, that under the law as it existed up until the decision of the court below, the Authority did not have such an interest.

Over the years, four interests have usually been held to constitute a "special interest" in property. They are (1) the interest of an attaching officer, *Magaw* v. *Beals,* 272 Mass. 334, 172 N.E. 347; *Guttentag* v. *Huntley,* 245 Mass. 212, 139 N.E. 501; *McArthur Co.* v. *Beals,* 243 Mass. 449, 137 N.E. 697; *Mills* v. *Sullivan,* 222 Mass. 587, 111 N.E. 605; *Farrington* v. *Edgerly,* 13 Allen 453; *Commonwealth* v. *Morse,* 14 Mass. 216; *Ladd* v. *North,* 2 Mass. 513; (2) the interest of a lienor, *Michigan State Bank* v. *Gardner,* 15 Gray 362; (3) the interest of a pledgee, *Associates Discount Corporation* v. *C. E. Fay Co.,* 307 Mass. 577, 580, 30 N.E. 2d 876, 879; *Harding* v. *Eldridge,* 186 Mass. 39, 42, 71 N.E. 115; *Thompson* v. *Dolliver,* 132 Mass. 103; and (4) the interest of a bailee, *Nash* v. *Lang,* 268 Mass. 407, 414, 167 N.E. 762, 765. Other interests held to be a "special interest" may be found in 52 C.J.S., *Larceny,* s. 81; 32 Am. Jur., *Larceny,* s. 113.

Common to *all* species of special interests were two prerequisites: first that the holder of such an interest have either actual possession or the right to immediate possession; and second, that he have the right to detain the property against the general owner, even though his special interest is subordinate to that of the general owner. 73 C.J.S., Property s. 1(c). Holmes considered "special property" to have little or no significance beyond that of possession. Holmes, *The Common Law*, 242-244 (Little, Brown and Co. 1881). Here the Authority had neither actual nor constructive possession,[18] nor the right to detain the money

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[18] That the Authority did not have actual possession of the money, which was on deposit in a general account of the First National Bank of Boston in the Chemical Bank New York Trust Company, requires little citation of authority. Cf. *New England Box Co.* v. *C. & R. Constr. Co.*, 313 Mass. 696, 707-711, 49 N.E. 2d 121, 128-130, and cases cited.

That the Authority did not have constructive possession is equally clear:

A person has constructive possession of specific, identifiable property only when he has the right to immediate, actual possession of the same property and the present ability to obtain possession of it. *Commonwealth* v. *Binkiewicz*, 342 Mass. 740, 175 N.E. 2d 474; *Commonwealth* v. *Conroy*, 333 Mass. 755, 133 N.E. 2d 246; *Commonwealth* v. *Cataldo*, 326 Mass. 377, 94 N.E. 2d 761; *Commonwealth* v. *Tilley*, 306 Mass. 402, 28 N.E. 245; *Commonwealth* v. *Anderson*, 245 Mass. 187, 139 N.E. 436; *Commonwealth* v. *Johnson*, 199 Mass. 62, 85 N.E. 188; *Commonwealth* v. *Conlin*, 188 Mass. 282, 74 N.E. 351; *Commonwealth* v. *Lawless*, 103 Mass. 425; *Commonwealth* v. *Tivnon*, 8 Gray 375; 73 C.J.S., *Property*, s. 14. In the leading case of *Commonwealth* v. *Tivnon*, *supra*, the court cited as examples of constructive possession (a) actual possession in an agent or servant, (b) actual possession in a co-owner, or (c) access to the property at pleasure.

None of those criteria will serve to support or sustain a finding that the Authority had constructive possession of the money allegedly stolen. Apart from the obvious fact that the Construction Fund Trustee (the First National Bank of Boston) was neither an agent or servant of, nor co-owner with, the Authority, the Authority never had the right to the immediate, actual possession of specific, identifiable money or the present ability to obtain possession of it. Such a right or ability would have defeated the very purpose of Resolution No. 8, which expressly provided that the proceeds realized from the sale of the bonds were to be "deposited with and held by the Construction Fund

allegedly stolen against the First National Bank of Boston,[19] and, consequently, the Authority did not even have a special interest in that money.

All that the Authority had was a contractual right to have the Construction Fund Trustee (the First National Bank of Boston) pay the "Cost of the Project." See Note, *Federal Legislation—Trust Indenture Act of 1939*, 28 Geo. L. J. 1084, 1085-1086 (1940). Such a right cannot be the subject of a larceny. *State* v. *Polzin*, 197 Wash. 612. Nor, assuming *arguendo* that Resolution No. 8 gave the Authority an equitable or reversionary interest, can the holder of such an interest be the person in whom ownership or possession may be laid in an indictment. 52 C.J.S., *Larceny* s. 81; 32 Am. Jur., *Larceny* s. 113; 2 Wharton *Criminal Law* s. 497 (1957 Ed.); Joyce, *Indictments* s. 427 (2nd Ed.); 2 Russell, *Crime* 1043 (10th Ed.).

The court below dismissed this argument by pointing out that the Authority had control over the spending of the money for the building of the garage, and cited two cases to support this theory. But never before has this contractual right to control been considered special property. In *Commonwealth* v. *McDonald*, 187 Mass. 581, 73 N.E.

Trustee . . . in trust and applied only for the payment of the Cost of the Project." (Ex. 6, pp. D-7, D-8; Tr. 325-326.)

As a result, the Authority did not have, any more than those who have checking accounts in the First National Bank of Boston, constructive possession of any of the funds in the possession of that bank. Cf. *Merchants' National Bank* v. *State Bank*, 10 Wall. 604, 641-643, 19 Law Ed. 1008, 1017-1018; *Wright* v. *Paine*, 62 Ala. 340; Brown, *Personal Property*, 277-278 (1955 Ed.).

[19] In fact, the Authority had no right to possession at all under Section 406 of the Trust Agreement (Resolution No. 8, Exhibit 6, pp. D-9, D-10; Tr. 326-329), part of which reads:

> "Upon receipt of each such requisition and all required accompanying certificates, the Construction Fund Trustee shall pay each such item from the Construction Fund *directly to the person entitled thereto* as named in such requisition, or shall deliver to the Authority a check or draft for the payment thereof payable to the order of said person." (Emphasis added.)

852 (1905), the person whose property was alleged to have been stolen had the right to immediate possession of the money involved. He had merely given it to a temporary custodian to hold for him.

The other case cited by the court below to support its position was *Commonwealth* v. *Fitzgerald*, 164 Mass. 587, 42 N.E. 119 (1895). That case did not even involve a larceny. There the defendant was convicted of burning a bridge, the property of the county. The bridge was in the county, was built by the county, the county paid for a part of its upkeep, and the materials of the bridge would revert to the county when the bridge was no longer a part of the public way. The holding was that the bridge *qua* bridge was a public way, but that the materials of the bridge *qua* materials were the property of the county. This case does not support the court's theory.

The proof of property did not meet the allegation, and the conviction violated petitioners' rights under the Fourteenth Amendment to the Constitution. *Fields* v. *City of Fairfield*, 375 U.S. 248, 84 S. Ct. 360; *Garner* v. *Louisiana*, 368 U.S. 157, 82 S. Ct. 248; *Thompson* v. *Louisville*, 362 U.S, 199, 80 S. Ct. 624. If the proof met the charge, it was only because the law was changed, in which case there was a violation of the *ex post facto* clause of the Constitution. *Bouie* v. *City of Columbia*, 378 U.S. 347, 84 S. Ct. 1697.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

SEPARATELY BOUND

Appendix B

CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION

Article I, section 10, clause 1, provides, so far as relevant:

> No State shall . . . pass any . . . ex post facto law. . . .

Article IV, section 2, clause 2, provides:

> A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

The Fourteenth Amendment provides:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

MASSACHUSETTS CONSTITUTION

Declaration of Rights, Article 12 provides:

> ". . . And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land."

Appendix C

STATUTORY PROVISIONS

MASSACHUSETTS STATUTES

St. 1958, c. 606 provides in pertinent part as follows:

SECTION 2. *Definitions.* As used in this act, the following words and terms shall have the following meanings, unless the context shall indicate another or different meaning or intent:—

(a) "Authority" shall mean the Massachusetts ing Parking Authority, created by section three of this act, . . .

(c) "Cost of the project" shall embrace the cost of preparing plans and specifications for, and constructing the garage, tunnel, and underground passageway, . . .

(i) "Trustee" shall mean the bank or trust company acting as trustee under the resolution whereby the revenue bonds herein provided for are issued by the Authority or under a trust agreement made and entered into by and between the Authority and a bank or trust company. . . .

SECTION 3. *Massachusetts Parking Authority.*—There is hereby created and placed in the state department of public works a body politic and corporate to be known as the "Massachusetts Parking Authority," which shall not be subject to the supervision and regulation of the department of public works or of any other department, commission, board, authority, bureau or agency of the commonwealth except to the extent and in the manner provided in this act. The Authority is hereby constituted a public instrumentality and the exercise by the Authority of the powers conferred by this act in the construction, operation and maintenance of the garage shall be deemed and held to be the performance of an essential governmental function.

The Massachusetts Parking Authority shall consist of three unpaid members, . . .

SECTION 5. *General Grant of Powers.*—The Authority is hereby authorized and empowered— . . .

(e) To prepare plans and specifications for, construct, reconstruct, extend, improve, insure, repair, maintain, operate or lease a garage under Boston Common for the parking and the servicing and repairing of motor vehicles, together with all necessary and convenient approaches to such garage above and below ground, including the underground passageway and the tunnel;

(f) To issue Common garage revenue bonds of the Authority, interim receipts, and temporary bonds, payable solely from revenues as hereinafter provided, and to refund its bonds, all as provided in this act; . . .

(l) To make and enter into all contracts, leases and agreements necessary or incidental to the performance of its duties and the execution of its powers under this act, including leases with any person, partnership, association, or corporation for the operation of the project;

(m) To employ consulting engineers, accountants, attorneys, construction and financial experts, superintendents, managers and such other employees and agents as may be necessary in its judgment, and to fix their compensation, . . .

(p) To do all acts and things necessary or convenient to carry out the powers expressly granted in this act. . . .

SECTION 8. *Common Garage Revenue Bonds.*—The Authority is hereby authorized to provide by resolution, at one time or from time to time, for the issuance of Common garage revenue bonds of the Authority for the purpose of paying all or any part of the cost of the project or any

part or parts thereof. The principal of and the interest on such bonds shall be payable solely from the funds herein provided for such payment. . . .

The Authority may sell such bonds in such manner, either at public or at private sale, and for such price, as it may determine to be for the best interests of the Authority.

The proceeds of the bonds shall be used solely for the payment of the cost of the project, and shall be disbursed in such manner and under such restrictions, if any, as the Authority may provide in the resolution authorizing the issuance of such bonds or in the trust agreement hereinafter mentioned securing the same. . . .

If the proceeds of the bonds shall exceed such cost, the surplus shall be deposited to the credit of the sinking fund for such bonds. . . .

SECTION 9. *Trust Agreement.*—In the discretion of the Authority, the bonds issued under the provisions of this act may be secured by a trust agreement by and between the Authority and a corporate trustee, which shall be any trust company or bank having the powers of a trust company within the commonwealth. Such trust agreement or the resolution providing for the issuance of such bonds may pledge or assign the fees and other revenues to be received, but shall not convey or mortgage the project or any part thereof. Such trust agreement or resolution providing for the issuance of such bonds may contain such provisions for protecting and enforcing the rights and remedies of the bondholders as may be reasonable and proper and not in violation of law, including covenants setting forth the duties of the Authority in relation to the acquisition of property and the construction, improvement, maintenance, operation, leasing, repair and insurance of the project, the rates of fees to be charged, and the custody, safeguarding and application of all moneys, and may contain provision for the employment of consulting engineers in connection with the

construction and operation of the project. It shall be lawful for any bank or trust company incorporated under the laws of the commonwealth which may act as depositary of the proceeds of the bonds or of revenues to furnish such indemnifying bonds or to pledge such securities as may be required by the Authority. Such trust agreement or resolution shall set forth the rights and remedies of the bondholders and of the trustee, and may restrict the individual right of action by bondholders. In addition to the foregoing, such trust agreement or resolution may contain such other provisions as the Authority may deem reasonable and proper for the security of the bondholders. All expenses incurred in carrying out the provisions of such trust agreement or resolution may be treated as a part of the cost of operation of the project.

SECTION 10. *Revenues.*—The Authority is hereby authorized to fix, revise, charge and collect fees for the use of the project and the different parts or sections thereof, and for the servicing of motor vehicles including the making of minor repairs, and to contract with any person, partnership, association or corporation as to the lease of the project for the parking and servicing of motor vehicles including the making of minor repairs and as to the sale of gasoline, and other motor vehicle fuels, oils and accessories. Such fees and the proceeds of such lease and contracts shall be so fixed and adjusted in respect to the aggregate of revenue from the project as to provide a fund sufficient to pay (a) the administrative expenses of the Authority and the cost of insuring, repairing, maintaining, operating or leasing the project and all extensions and improvements thereto, and (b) the principal of and the interest on bonds issued under this act as the same shall become due and payable, and (c) to create reserves for such purposes. Such fees and such lease and contract shall not be subject to supervision or regulation by any department, division, commis-

sion, board, bureau or agency of the commonwealth or any political subdivision thereof. The fees and all revenues derived from leases and contracts, except such part thereof as may be necessary to pay such current expenses and to provide such reserves therefor as may be provided for in the resolutions authorizing the issuance of such bonds or in the trust agreement securing the same, and as may be necessary to meet any sinking fund requirements for the outstanding bonds, shall be set aside at such regular intervals as may be provided in such resolution or such trust agreement in a sinking fund which is hereby pledged to and charged with the payment of (1) The interest on such Common garage revenue bonds as such interest shall fall due; (2) The principal of such bonds as the same shall fall due; and (3) The redemption price or the purchase price of bonds retired by call or purchase as therein provided. Such pledge shall be valid and binding from the time when the pledge is made; the fees and other revenues or other moneys so pledged and thereafter received by the Authority shall immediately be subject to the lien of such pledge without any physical delivery thereof or further act, and the lieu of any such pledge shall be valid and binding as against all parties having claims of any kind in tort, contract, or otherwise against the Authority, irrespective of whether such parties have notice thereof. Neither the resolution nor any trust agreement by which a pledge is created need be filed or recorded except in the records of the Authority. The use and disposition of moneys to the credit of such sinking fund shall be subject to the provisions of the resolution authorizing the issuance of such bonds or of such trust agreement. Except as may otherwise be provided in such resolution or trust agreement, such sinking fund shall be a fund for all such bonds without distinction or priority of one over another.

SECTION 11. *Trust Funds.*—All moneys received pursuant to the authority of this act, whether as proceeds from the sale of Common garage revenue bonds or as revenues, shall be deemed to be trust funds to be held and applied solely as provided in this act. The resolution authorizing the issuance of bonds or the trust agreement securing such bonds shall provide that any officer with whom, or any bank or trust company with which, such moneys shall be deposited shall act as trustee of such moneys and shall hold and apply the same for the purposes hereof, subject to such regulations as this act and such resolution or trust agreement may provide.

SECTION 12. *Remedies.*—Any holder of bonds issued under the provisions of this act or of any of the coupons appertaining thereto, and the trustee under any trust agreement or resolution, except to the extent the rights herein given may be restricted by such trust agreement or resolution, may, either at law or in equity, by suit, action, mandamus or other proceeding, protect and enforce any and all rights under the laws of the commonwealth or granted hereunder or under such trust agreement or resolution authorizing the issuance of such bonds, and may enforce and compel the performance of all duties required by this act or by such trust agreement or resolution to be performed by the Authority or by any officer thereof, including the fixing, charging and collecting of fees . . . .

SECTION 18. *Preliminary Expenses.*—To provide for the preliminary expenses of the Authority in carrying out the provisions of this act, the sum of two hundred thousand dollars is hereby appropriated, which sum shall be paid to the Authority, and, simultaneously with the delivery of the bonds, the sum so paid shall be reimbursed by the Authority to the commonwealth out of the proceeds of any bonds which may be issued under the provisions of this act.

The Authority is hereby authorized and directed to make such surveys and studies of the project as may be necessary to effect the financing authorized by this act at the earliest practicable time and for this purpose to employ such consulting engineers, traffic engineers, legal and financial experts and such other employees and agents as it may deem necessary. . . .

G.L. (Ter. Ed.) c. 234, s. 28 provides:

> "Upon motion of either party, the court shall, or the parties or their attorneys may under the direction of the court, examine on oath a person who is called as a juror therein, to learn whether he is related to either party or has any interest in the case, or has expressed or formed an opinion, or is sensible of any bias or prejudice, therein; and the objecting party may introduce other competent evidence in support of the objection. If the court finds that the juror does not stand indifferent in the case, another shall be called in his stead."

G.L. (Ter. Ed.) c. 266, s. 30 provides in pertinent part:

> "(1) Whoever steals, or with intent to defraud obtains by a false pretence, or whoever unlawfully, and with intent to steal or embezzle, converts, or secretes with intent to convert, the property of another as defined in this section, whether such property is or is not in his possession at the time of such conversion or secreting, shall be guilty of larceny, and shall, if the value of the property stolen exceeds one hundred dollars, be punished by imprisonment in the state prison for not more than five years, or by a fine of not more than six hundred dollars and imprisonment in jail for not more than two years; . . ."

G.L. (Ter. Ed.) c. 268, s. 8 (1961) provided:

> "A legislative, executive, judicial, county or municipal

officer who corruptly requests or accepts a gift or gratuity or a promise to make a gift or to do an act beneficial to him, under an agreement or with an understanding that his vote, opinion or judgment shall be given in any particular manner, or upon a particular side of any question, cause or proceeding, which is or may be by law brought before him in his official capacity or as a consideration for any speech, work or service in connection therewith, or that, in such capacity, he shall make any particular nomination or appointment, shall forfeit his office, be forever disqualified to hold any public office, trust or appointment under the constitution or laws of the commonwealth, and be punished by imprisonment in the state prison for not more than ten years or by a fine of not more than five thousand dollars and imprisonment in jail for not more than two years; and an executive, county other than judicial, or municipal officer who is finally convicted of committing, in connection with the performance of the duties of such office, the crime of larceny, embezzlement or obtaining money under false pretences shall, in addition to the penalty imposed by law for the punishment of such crime, forfeit his office and be forever disqualified to hold any public office, trust or appointment as aforesaid."

G.L. (Ter. Ed.) c. 268, s. 9 (1961) provided:

"An officer or agent of, or a person employed by, the commonwealth, or by a county, city, town, or by any public institution not mentioned in section twelve who, being authorized to procure materials, supplies or other articles either by purchase or contract, or to employ service or labor, receives, directly or indirectly, for himself or for another, a commission, discount, bonus, present or reward from the person who makes such contract, furnishes such materials, supplies or

other articles, or from a person who renders service or labor under such contract, and a person who gives or offers such commission, discount, bonus, present or reward, shall be punished by a fine of not less than ten nor more than five hundred dollars or by such fine and imprisonment for not more than one year."

MASS. ST. 1962, c. 779, G.L. (TER. ED.) c. 268A:

SECTION 1:

(p) "State agency", any department of state government including the executive, legislative or judicial, and all councils thereof and thereunder, and any division, board, bureau, commission, institution, tribunal or other instrumentality within such department, *and any independent state authority*, district, commission, instrumentality or agency, but not an agency of a county, city or town. (Emphasis added.)

(q) "State employee", a person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis, including members of the general court and executive council, but excluding members of the judiciary, but not excluding any other officers and employees of the judicial department.

SECTION 2:

(b) "Whoever, being a state, county or municipal employee or a member of the judiciary or a person selected to be such an employee or member of the judiciary, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives or agrees to receive anything of value for himself or for any other person or entity, in return for

(1) being influenced in his performance of any official act or any act within his official responsibility, or

(2) being influenced to commit or aid in committing, or to collude in, or allow any fraud, or make opportunity for the commission of any fraud, on the commonwealth or on a state, county or municipal agency, or

(3) being induced to do or omit to do any acts in violation of his official duty;

(d) . . . shall be punished by a fine of not more than five thousand dollars or by imprisonment in the state prison for not more than three years or in a jail or house of correction for not more than two and one half years, or by both such fine and imprisonment in a jail or house of correction; and in the event of final conviction shall be incapable of holding any office of honor, trust or profit under the commonwealth or under any state, county or municipal agency.

SECTION 3:

(b) Whoever, being a present or former state, county or municipal employee or member of the judiciary, or person selected to be such an employee or member of the judiciary, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly, asks, demands, exacts, solicits, seeks, accepts, receives or agrees to receive anything of substantial value for himself for or because of any official act or act within his official responsibility performed or to be performed by him;

(d) . . . shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both.

SECTION 4:

(a) No state employee shall otherwise than as pro-

vided by law for the proper discharge of official duties, directly or indirectly receive or request compensation from anyone other than the commonwealth or a state agency, in relation to any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest.

Whoever violates any provision of this section shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years or both.

G.L. (Ter. Ed.) c. 277, s. 58 provides:

"Larceny, whether at common law or as defined by section thirty of chapter two hundred and sixty-six, may be prosecuted and punished in any county where the defendant has possession of the property alleged to have been stolen."

G.L. (Ter. Ed.) c. 277, s. 59 provides:

"The crime of obtaining money or a personal chattel by a false pretence, and the crime described in section thirty-one of chapter two hundred and sixty-six , may be alleged to have been committed, and may be prosecuted and punished, in any county where the false pretence was made, written or used, or in or through which any of the property obtained was carried, sent, transported or received by the defendant."

G.L. (Ter. Ed.) c. 278, s. 9 provides:

"In the prosecution of crimes which relate to or affect real or personal estate, it shall be sufficient, and shall not be a variance, if it is proved on the trial that, at the time when the crime was committed, either the actual or constructive possession or the general or special property in the whole or any part of such real or personal estate was in the person or community alleged to be the owner thereof."

Appendix D

How Other States Provide a Defendant with the Opportunity to Prove Prejudice on the Part of Jurors

Forty States in Which by Statute, Rule or Judicial Decision a Defendant Has the Right to Examine Prospective Jurors[1]

1. Ala. Code tit. 30, sec. 52 (1940) provides that "either party shall have the right to examine jurors . . . ." In *Jackson* v. *McFadden*, 260 Ala. 109, 69 So. 2d 286, the right to examine prospective jurors was recognized, although counsel was held to have waived his right.

2. Alaska Compiled Laws, sec. 55-7-41 (1949) provides that in civil and criminal cases, "jurors shall be examined as to their qualifications first by the plaintiff and then by the defendant."

3. Ariz. Supreme Court Rule 217 reads: "Either party may question the jurors."

4. Ark. Stat. sec. 39-226 (1947) reads: "The court shall examine all prospective jurors under oath upon all matters set forth in the statutes as disqualifications. Further questions may be asked by the Court, or by the attorneys in the case, in the discretion of the Court." In spite of this statute, Arkansas courts recognize a lawyer's right to examine jurors. *In Missouri Pac. Transp. Co.* v. *Johnson*, 197 Ark. 1129, 126 S.W. 2d 931, the trial court offered to ask the jurors any questions that defendant's lawyer might suggest. Still, the appellate court reversed solely because the trial judge did not allow defendant's attorney to examine each juror directly. In *Sorrentino* v. *State*, 214 Ark. 115, 119, 214 S.W. 2d 517, 520, the court said: "Appellant had a right to inquire into the attitude of the prospective juror. . . ."

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[1] Some civil cases are cited, but only where states do not distinguish between civil and criminal voir dire examinations.

5. Cal. Penal Code sec. 1078 (Deering's 1959) requires that the "trial court . . . shall permit reasonable examination of prospective jurors by counsel for the people and for the defendant." In *People* v. *Coen*, 205 Cal. 596, 605-606, 271 Pac. 1074, 1078, defendant's counsel sought to ask the prospective jurors whether they had read various newspaper articles about the case. The appellate court stated that "the trial court unduly restricted the examination" by disallowing the questions concerning newspaper publicity, but held that defendant's rights were lost by waiver.

6. *Zancannelli* v. *People*, 63 Colo. 252, 260, 165 Pac. 612, 614, holds that "the defendant had a right to propound questions to the proposed jurors . . . ."

7. Conn. Gen. Stat. sec. 51-240 (1958) provides that "either party may examine each juror . . . ."

8. Fla. Stat. sec. 54.13 (1959) provides that "the respective parties" shall "have the right to orally examine jurors upon their voir dire."

9. Ga. L. 1951, p. 216 and L. 1959, p. 1083 provide that "both the State and the defendant shall have the right to an individual examination of each juror . . . ."

10. Hawaii R.L. sec. 231-10 (1955) reads: "Either party shall have the right to examine a proposed juror . . . ."

11. In *State* v. *Hoagland*, 39 Idaho 405, 228 Pac. 314 the appellate court assumed counsel's right to ask relevant questions. *State* v. *Healey*, 45 Idaho 73, 260 Pac. 694, is another example of Idaho's custom of allowing counsel to examine jurors.

12. Ill. R.S. c. 110, sec. 101.24-1 (1959) reads: "The parties or their attorneys shall be allowed a reasonable opportunity to supplement (the judge's) examination . . ." In *Donovan* v. *People*, 139 Ill. 412, 28 N.E. 964, the trial judge offered to ask the jurors questions if defense counsel would suggest them, the conviction was reversed because defense counsel was not given an opportunity to ask the

questions directly. Similarly, in *People* v. *DeLordo*, 350 Ill. 148, 151-152, 182 N.E. 726, 728, the conviction was reversed because defense counsel was not given an opportunity to examine the jurors; the trial court's error "deprived the defendants of a fair and impartial trial."

13. *Roby* v. *State*, 215 Ind. 55, 17 N.E. 2d 800, assumes that in accord with Indiana practice, there will be some examination by defendant's counsel, as does *Epps* v. *State*, 102 Ind. 539, 1 N.E. 491. There is a "right in examining prospective jurors to ask any questions pertinent to the issue (which tends) to elicit information upon which to base a challenge, either peremptory or for cause." *Baker* v. *State*, 190 Ind. 385, 395, 129 N.E. 468, 472.

14. In Iowa counsel have an opportunity for "cross-examination" of prospective jurors. *State* v. *Rhodes*, 227 Ia. 332, 335, 288 N.W. 98, 100, *cert. denied*, 310 U.S. 626, 60 S. Ct. 980. Other examples of the Iowa custom permitting counsel to examine prospective jurors directly are *State* v. *Harrington*, 220 Ia. 1116, 264 N.W. 24, and *State* v. *Wheelock*, 218 Ia. 178, 254 N.W. 313.

15. *State* v. *Maxwell*, 151 Kan. 951, 956, 102 P. 2d 109, 113, recognizes counsel's "right to interrogate jurors."

16. In *Lightfoot* v. *Commonwealth*, 310 Ky. 151, 159, 219 S.W. 2d 984, 989, it was held that a "litigant is entitled to make inquiry of jurors in respect to any matter which will throw light on the background of the juror . . . ." Another Kentucky case where defense counsel examined prospective jurors is *Tarrance* v. *Commonwealth*, 265 S.W. 2d 40, *cert. denied*, 348 U.S. 899, 75 S. Ct. 220.

17. La. R.S. tit. 15, sec. 349 (1950) reads: "Examination of prospective jurors shall be conducted in the manner as now provided by existing laws." *State* v. *Guidry*, 160 La. 655, 656-659, 107 So. 479, 480-481, reveals that "manner". There the court reversed a conviction because counsel was not allowed to examine prospective jurors directly, though

the trial judge permitted counsel to suggest questions for the judge to ask, saying: "Article 1, sec. 9 of the (state) Constitution guarantees the right of a person accused of crime to a speedly public trial by an impartial jury." The trial judge's willingness to re-state questions proposed by defendant's counsel did not cure the defect. "By repetition the questions lose their force and value," and the examination "becomes as unsatisfactory as the examination of a foreign witness by the aid of interpreter."

18. Minn. Stat. sec. 631.26 (1953) provides that "either party may examine (a prospective juror) . . . ." *State* v. *Baner*, 189 Minn. 280, 281, 249 N.W. 40 states: "Litigants in a case, criminal or civil, are entitled to a fair, competent, and impartial jury. They should have the opportunity on the voir dire examination of the prospective jurors to ascertain . . . any bias they may entertain concerning the subject matter of action."

19. Miss. Code sec. 1802 (1942) reads: "The parties or their attorneys in all jury trials shall have the right to question jurors . . . and it shall not be necessary to propound the questions through the presiding judge, but they may be asked by the attorneys . . . ."

20. *State* v. *Dill*, Mo., 282 S.W. 2d 456, assumes counsel's right to examine jurors. Missouri cases where parties examined prospective jurors directly include *State* v. *Malone*, Mo., 301 S.W. 2d 750; *McCollum* v. *Executive Aircraft*, 291 S.W. 2d 650; *State* v. *Hoffman*, 344 Mo. 94, 125 S.W. 2d 55; *Harris* v. *St. Louis-San Francisco Ry. Co.*, 60 S.W. 2d 652.

21. In *State* v. *Brooks*, 57 Mont. 480, 486, 188 Pac. 942, 943, the conviction was reversed because of the trial court's limiting of defendant's questioning of prospective jurors. "The voir dire examination of jurors is a right secured to the defendant . . . ."

22. *Oden* v. *State*, 166 Neb. 729, 730, 735, 90 N.W. 2d 356, 357, 360, recognizes a defendant's "right to have his

counsel personally conduct a voire dire examination" as "uniformly and customarily practiced," and kept in force by Neb. R.S. sec. 25-1106 (1943), which provides: "The general mode of summoning, impanelling, challenging and swearing the jury is not changed by this code."

23. *State* v. *McNeil*, 53 Nev. 428, 440, 4 P. 2d 880, 892, labels counsel's examining jurors as "cross-examination". Other Nevada cases which assume that defendant's counsel can examine prospective jurors include *State* v. *Casey*, 34 Nev. 154, 117 Pac. 5; *Bryant* v. *State*, 72 Nev. 330, 305 P. 3d 360; *State* v. *Shaddock*, Nev. 344 P.2d 191.

24, N.J. Stat. 2A: 78-4 (1951) provides that "all parties may, within the discretion of the court, question any person summonsed as a juror . . . ." N.J. Criminal Practice Rule 3:7-2 (b) provides that questions "shall be permitted, within the discretion of the court." *Springdale Park, Inc.* v. *Andriotis*, 30 N.J. Super 257, 104 A. 2d 327, indicates that the trial judge's discretion does not extend so far as to permit the elemination of direct examination by counsel. "That a party to litigation may examine into the qualifications, attitudes and inclinations of jurors . . . is unquestioned," 30) N.J. Super. at 262, 104 A. 2d at 330. "A wide latitude is allowed counsel in examining on the *voir dire.*" *State* v. *Grillo*, 16 N.J. 103, 110, 106 A.2d 294, 298.

25. *State* v. *Douthitt*, 26 N.M. 533, 535-536, 194 Pac. 879, states that "the rule in this state, as in the majority of the United States, is that the defendant in a criminal case is entitled to make reasonable and pertinent inquiries of a juror on his voir dire . . ."

26. In New York, "it is the right of every litigant . . . to interrogate the jurors drawn," *Fortune* v. *Trainor*, 19 N.Y. Supp. 598 ,599. In *People* v. *Hosier*, 132 App. Div. 146, 116 N.Y. Supp. 911, *aff'd*, 196 N.Y. 506, 89 N.E. 1107, the conviction was reversed, the court holding that the defendant "was entitled to a reasonable examination of

each proposed juror," 132 App. Div. at 150, 116 N.Y. Supp. at 914. Other New York cases recognizing a defendant's right to examine prospective jurors include *People* v. *Jelke*, 284 App. Div. 211, 130 N.Y. S. 2d 662, *aff'd*, 308 N.Y. 56, 123 N.E. 2d 769; *People* v. *Winship*, 309 N.Y. 311, 130 N.E. 2d 634; *People* v. *Rendigs*, 123 Misc. Rep. 32, 205 N.Y. Supp. 133. In *Fischer* v. *Brooklyn Heights R. Co.*, 84 N.Y. Supp. 254, the court held that the right to examine the prospective jurors had been waived.

27. N.C. Gen. Stat. sec. 9-15 (1953) permits "any party" to "make inquiry as to the fitness and competency of any person to serve as a juror." "This section provides and gives the right to the State or to the defendant to inquire of the juror as to his fitness and competency to serve . . . ." *State* v. *Ashburn*, 187 N.C. 717, 721, 122 S.E. 833, 834.

28. N.D. Rev. Code sec. 29-1728 (1943) provides that "Either party . . . may examine the jurors . . . ."

29. Ohio Rev. Code sec. 2945.27 (Baldwin's 1958) reads: "The judge of the trial court . . . shall permit reasonable examination of such jurors by the prosecuting attorney and by the defendant . . . ."

30. *Kiser* v. *State*, 67 Okl. Cr. 16, 67, 68, 93 P. 2d 58, 87, 88, recognizes the "right" to examine jurors.

31. Ore. R.S. sec. 17.160 (1957) provides that jurors "shall . . . be examined as to their qualifications, first by the plaintiff, then by the defendant."

32. *Commonwealth* v. *Deysher*, 139 Pa. Super. 497, 500, 12 A. 2d 492, 493, refers to the defendant's "right to examine the prospective jurors under oath." Some cases permitting questioning by defense counsel are *Commonwealth* v. *Figari*, 166 Pa. Super. 169, 70 A. 2d 666; *Commonwealth* v. *Greenberg*, 143 Pa. Super .203, 17 A. 2d 698.

33. South Dakota cases assuming counsel's right to question jurors within reasonable limits include *State* v. *Krutzeldt*, 5 S.D. 435, 221 N.W. 53; *State* v. *Chapman*,

1 S.D. 414, 47 N.W. 411; and *State* v. *Mitchell*, 46 S.D. 272, 192 N.W. 487.

34. In Tennessee, "it is the right of the litigant to subject to a rigid examination every man presented to him as a juror . . . ." *Paducah, T. & A. R. Co.* v. *Muzzell*, 95 Tenn. 200, 31 S.W. 999, 1000. The "questions asked by the attorneys are within the discretion of the *attorneys*," *Long* v. *State*, 187 Tenn. 139, 213 S.W. 2d 37, 40. (Italics supplied.)

35. In Texas, "it is the well established rule of law" that an accused may question jurors. *Livingston* v. *State*, 152 Tex. Crim. App. 302, 306, 214 S.W. 2d 119, 121.

36. *State* v. *Turley*, 87 Vt. 163, 88 Atl. 562, reveals the Vermont practice of allowing examination by counsel, as does *Parker* v *.Hoefer*, 118 Vt. 1, 100 A. 2d 434.

37. Wash. Rev. Code sec. 4.44.210 (1951) provides that prospective jurors are "examined as to their qualifications, first by the plaintiff and then by the defendant. Sec. 10.49.020 makes his section applicable to criminal trials.

38. W. Va. Code sec. 5646 (1955): "Either party . . . may . . . examine on oath any person who is called as a juror."

39. Wis. Stat. sec. 270.16 (1957) recognizes "the right of either party . . . to examine any (prospective juror)". Sec. 957.14 makes sec. 270.16 applicable to criminal cases.

40. In Wyoming, "litigants should be given reasonable opportunity to make inquiries" of jurors, so that counsel may "secure the impartial and disinterested jury which the law contemplates." *Eggan* . *O'Malley*, 45 Wyo. 505, 511, 21 P. 2d 821, 822. Counsel propound the "interrogatories under our state practice." 45 Wyo. at 513, 21 P. 2d at 823. Other examples of the Wyoming practice permitting counsel to examine prospective jurors directly are *Loy* v. *State*,

26 Wyo. 381, 185 Pac. 796; *Johnson* v. *State*, 29 Wyo. 121, 211 Pac. 484; *Starke* v. *State*, 17 Wyo. 55, 96 Pac. 148.

THE OTHER TEN STATES

1. Del. Super. Ct. (Crim.) Rule 24(a) provides: ". . . the court shall permit or conduct such examination as is reasonably calculated to ascertain prejudice of a juror." If the court conducts the examination, "the court shall permit the defendant or his attorney and the Attorney General to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper." The Delaware rule provides for an even more comprehensive examination than that of the federal courts: "The Delaware Rule on examination of trial jurors is broader than the Federal Rule in that it requires the court to 'permit or conduct such examination as is reasonably calculated to ascertain prejudice of a juror.'" Hermann, *The New Rules of Procedure in Delaware*, 18 F.R.D. 327, 332.

2. Me. R.S. c. 113, sec. 101 (1954) provides: "The court, on motion of either party in a suit, may examine, on oath, any person called as a juror therein, whether he is related to either party, has given or ofrmed an opinion or is sensible of any bias, prejudice or particular interest in the cause . . . ." *State* v. *Knight*, 43 Me. 11, 114-115, holds that this section applies to criminal trials. But Maine voir dire examinations are not limited to the questions specfied in the statute. See, e.g. *State* v. *Albano*, 119 Me. 472, 111 Atl. 753.

3. *Bryant* v. *State*, 207 Md. 565, 583, 115 R. 2d 502, 510 recognizes "the right to discover the juror's state of mind in respect to the matter in hand or any collateral matter reasonably liable to unduly influence him," though the court upheld the trial judge's refusal to ask whether a

juror had ever been a client of either of the state's attorneys.

In *Brown* v. *State* 220 Md. 29, 33, 34, 150 A. 2d 895, 897, the court upheld the trial judge's refusal to ask "whether the jurors had read or heard any accounts of the case in the newspapers or on the radio or television, and whether they had discussed the guilt or innocence of the accused," but reversed, because of the prejudice to the appellant from the failure of the trial court to examine the jurors as to possible racial prejudice. Maryland has no specific rule as to what questions are to be asked on voir dire, *Bryant* v. *State*, 207 Md. at 583, 115 A. 2d at 510. The trial judge cannot relieve himself of his obligations by asking a few general questions. The particular facts involved determine what questions are necessary. With sufficiently massive publicity Maryland would perhaps require questions concerning newspaper articles, though in *Goldstein* v. *State*, 220 Md. 39, 150 A. 2d 900, involving convictions for suborning police officers to perjure themselves, the trial court's refusal to ask jurors about newspaper publicity concerning other matters than those for which the defendants were tried was upheld.

4. "As was said in *Commonwealth* v. *DiStasio*, 294 Mass. 273, 280, 'In this Commonwealth the examination of prospective jurors is "under the direction of the court," whether conducted by counsel, or, as is customary, by the judge. Seldom is it permitted to extend beyond the statutory questions. *Commonwealth* v. *Cero*, 264 Mass. 264, 279 271. Whether other questions shall be asked is discretionary with the judge. *Commonwealth* v. *Millen*, 289 Mass. 441, 475, 476'." *Commonwealth* v. *Geagan*, 339 Mass. 487, 159 N.E. 2d 870, 883, *cert. denied* 361 U.S. 895.

5. Mich. Ct. Rule 37, sec. 1 provides: "The *voir dire* examination of jurors in al cases may be conducted by the

trial judge, or he may, in his discretion ,permit such examination by the attorneys for the respective parties. If made by the judge, counsel for any of the parties desiring that additional matters be inquired into shall request the judge to interrogate the juror relative thereto, which request, if the matter be deemed material, shall be granted."

"It is indispensable to a fair trial that a litigant be given a reasonable opportunity to ascertain on the *voir dire* whether any of the jurors summoned are subject to being challenged for cause or even peremptorily." *Fedorinchik* v. *Stewart,* 289 Mich. 436, 438, 286 N.W. 673, 674. In *People* v. *Lockhart,* 342 Mich. 595, 70 N.W. 2d 802, the Michigan trial judge asked, without a request by counsel, whether the jurors had read or heard anything about the case.

6. N.H. R. S. sec. 500: 32 (1955) provides: "Any juror may be required by the court, on motion of a party in the cause to be tried, to answer upon oath whether he expects to gain or lose by the issue of the cause; whether he is related to either party; whether he has advised or assisted either party, or directly or indirectly given his opinion or has formed an opinion; whether he is sensible of any prejudice in the cause; or whether any one of the counsel in the cause is employed by him in any action then pending in said court. . . ." *State* v. *Sawtelle,* 66 N.H. 488, 530, 32 Atl. 821, 847, interprets the statute to provide for further inquiry—beyond the statutory questions.

7. R.I. G.L. sec. 9-10-14 (1956) provides: "The court shall, on motion of either party in a suit examine on oath a person who is called as a juror therein, to know whether he is related to either party, or has any interest in the cause, or has expressed or formed an opinion, or is sensible of any bias or prejudice therein. . . ." In *State* v. *Kieon,* R.I., 152 A. 2d 531, and *State* v. *Greene,* 74 R.I., 437, 60 A. 2d 711, e.g., counsel were permitted to examine

the jurors, the voir dire examination extending beyond the statutory questions.

8. S.C. Code sec. 38-202 (1952) provides: "The court shall, on motion of either party in the suit, examine on oath any person who is called as a juror therein to know whether he is related to either party, has any interest in the cause, has expressed or formed any opinion or is sensible of any bias or prejudice therein. . . ." In South Carolina statutory questions and acceptable answers do not constitute a sufficient *voir dire* examination. *Brown* v. *S.H. Kress and Co.*, 170 S.C. 178, 180, 170 S.E. 142, held: "The qualification of a juror is not to be determined alone by the fact that he declares his fairness and impartiality." In *State* v. *Gidron*, 211 S.C. 360, 366, 45 S.E. 2d 587, 589, "the usual questions were propounded. . . . After this was done, the Court said: 'Now, gentlemen, is that satisfactory? If it is not, I want to give the defendant every right.'" The court upheld an examination with no additional questions, but defendant had waived his rights.

9. Utah Code sec. 77 28-1 (1953) provides: ". . . the examination of the jurors shall be conducted by the judge. The judge may permit counsel for either side to examine the jurors, but such examination by counsel shall be limited by the court." *State* v. *Gregorious*, 81 Utah 33, 16 P. 2d 893, reveals Utah's willingness to vary the voir dire examination in response to the facts of a particular case.

10. Va. Code sec. 8-199 (150) provides: "The court shall, on motion of either party in any suit, or may, of its own accord, examine on oath any person who is called as a juror therein to ascertain whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein. . . ." Sec. 19-181 makes sec. 8-199 applicable to criminal proceedings. *Rust* v. *Reid*, 124 Va. 1, 20-21, 97 S.E. 324, 329, states that Virginia judges are not to rely

solely on answers to the four statutory questions: "It is not easy to see how jurors who had been intimately acquainted with the deceased for years . . . could disabuse their minds of opinions . . . and render a verdict solely on the evidence adduced at the trial. However honest they may have been in their belief that they could do so, the law does not "put them to such a test, nor subject the administration of justice to the suspicion of partiality." In *Hevener* v. *Commonwealth*, 189 Va. 802, 811, 54 S.E. 2d 893, 897, "the court gave (the juror) a searching examination," concerning what he knew about the case and what he had read. In Virginia, unlike Massachusetts, a juror's thinking himself qualified does not preclude further voir dire examination.

Appendix E

[Letterhead—Paul T. Smith]

October 20, 1964

Honorable Raymond S. Wilkins
Supreme Judicial Court
Boston, Massachusetts

RE: Commonwealth v.
Kiernan and Others
No. 13,156

Dear Mr. Chief Justice:

This is a petition for a rehearing in the above case on behalf of the appellants Francis W. Kiernan, Richard C. Simmers, and Richard K. Gordon, pursuant to the practice prescribed in *Powers* v. *Sturtevant*, 200 Mass. 519.

This petition consists of a suggestion of a point not discussed by the Court in its opinion of October 5, 1964, and not raised by the defendants in this Court or the court below. It was not raised earlier simply because it did not become relevant until after this Court overruled *Commonwealth* v. *Friedman*. 188 Mass. 308.

It is suggested to the Court that it is beyond the powers of the Commonwealth under the Constitution of the United States to punish one for a taking of property outside the territorial borders of the Commonwealth.

Perhaps the earliest expression of this principle can be found in the argument of Otis, counsel for defendant, in *Commonwealth* v. *Andrews*, 2 Mass. 14, at 15. This Court, by implication, accepted that argument in that case and in *Commonwealth* v. *Beaman*, 8 Gray 497. See also *Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. 430, 440, 64 S. Ct. 208, 214; *Home Insurance Co.* v. *Dick*, 281 U.S. 397, 50 S. Ct. 338; *New York Life Ins. Co.* v. *Head*, 234 U.S. 149, 34 S. Ct. 879.

The cases which hold that a larceny can be punished in a state other than the state in which the original asportation took place, do so on the theory that each moment that the

thief has possession of the stolen articles constitutes a new asportation. E.g., *Commonwealth* v. *Andrews*, supra, 2 Mass. at 22 (Sedgwick, J.), 23-24 (Dana, C.J.). This principle may operate only when the *identical* article stolen is the one transported into the other state. *Commonwealth* v. *Beaman*, 8 Gray 497, and cases cited; accord, *State* v. *Hedrick*, 272 Mo. 502; *Rainwater* v. *State*, 155 Miss. 684; *Grant* v. *State*, 42 Tex. Cr. 273; *Ballow* v. *State*, 42 Tex. Cr. 261, 263; 22 C.J.S., Criminal Law s. 185 (18).

The money in this case lost its identity when the $450,000.00 check was deposited in the account of the Foundation Company in the Chase Manhattan Bank in New York. Accord, *Burton* v. *United States*, 196 U.S. 283, 25 S. Ct. 243.

The Court dealt with this point only in deciding whether the defendants Simmers and Gordon could be considered principals or merely accessories after the fact. The Court ruled that the purpose of the crime was to get the funds to Brady, or to the persons designated by him, and that the defendants, having participated in the distribution of the funds, could be considered principals. (Opinion pp. 23-25.)

However, when the Court dealt with the question of where the crime took place, it decided only the question of venue. The Court did not consider whether Massachusetts had jurisdiction; only in which county venue could be laid assuming that Massachusetts *did* have jurisdiction. (Opinion, pp. 26-30.)

The case of *Commonwealth* v. *Beaman*, supra, should be controlling. In that case, the defendant was charged with larceny of a peahen and a turkey. The proof was that he stole them alive in Connecticut and was found with them dead in Massachusetts. This Court held that "the jury should have been instructed, as the defendants requested, 'that if the said fowls were alive when originally taken, from the possession of the owner in Connecticut, and were killed before being brought into this state, the defendants

could not be convicted of stealing them in this state.' " 8 Gray at 499. When the property changed in identity, the asportation ceased.

In the *Beaman* case, the Court apparently felt that for purposes of jurisdiction, the scope of the plot was irrelevant—only the places of asportation. Similarly, determining whether one was a principal or an accessory after the fact, is not relevant to the question of the Commonwealth's jurisdiction.

The crime charged was larceny. The larceny occurred in New York. The legislature could make a crime of making false pretenses with intent to defraud, and, perhaps, defendants could have been indicted for that crime. In fact, defendants were indicted and convicted of conspiracy to commit larceny. That was the sole crime within the jurisdiction of Massachusetts.

We have enclosed several copies of this letter for the convenience of the Court.

Very truly yours,

PAUL T. SMITH
MANUEL KATZ
DANIEL KLUBOCK
Attorneys for Appellants
Richard C. Simmers and
Richard K. Gordon
JOHN D. O'REILLY, JR.
Attorney for Appellant
Francis K. Kiernan

DK:le
Enclosures

SUPREME JUDICIAL COURT
BOSTON, MASSACHUSETTS

Raymond S. Wilkins
Chief Justice

October 21, 1964

Paul T. Smith, Esquire
Manuel Katz, Esquire
Daniel Klubock, Esquire
209 Washington Street
Boston, Massachusetts 02108
John D. O'Reilly, Jr., Esquire
St. Thomas More Drive
Brighton 35, Massachusetts

Dear Sirs:

Your request for rehearing in case No. 13156, *Commonwealth* v. *Kiernan*, has been received and will be considered by the full court.

Yours truly,
(s) RAYMOND S. WILKINS
Chief Justice

cc: Gael Mahony, Asst. Attorney General

SUPREME JUDICIAL COURT
BOSTON 8, MASSACHUSETTS

Raymond S. Wilkins
Chief Justice

October 27, 1964

Paul T. Smith, Esquire
Manuel Katz, Esquire
Daniel Klubock, Esquire
209 Washington Street
Boston, Massachusetts 02108
John D. O'Reilly, Jr., Esquire
St. Thomas More Drive
Brighton 35, Massachusetts

Dear Sirs:

Your request for rehearing in case No. 13156, *Commonwealth* v. *Kiernan*, has been considered by the full court and is denied.

Yours truly,
(s) R. S. WILKINS
Chief Justice

cc: Gael Mahony, Asst. Attorney General

Appendix F

COMMONWEALTH OF MASSACHUSETTS.
SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,
At Boston,
October 5, 1964.

IN THE CASE OF
COMMONWEALTH
vs.
FRANCIS W. KIERNAN & others
pending in the Superior Court for the County of Suffolk

ORDERED, that the following entry be made in the docket: vis.,—

The judgments against each defendant on each indictment are affirmed.

BY THE COURT,
(s) RICHARD A. McLAUGHLIN
Clerk

October 5, 1964
A True Copy,
Attest:

(s) JAMES B. GIBBONS
Assistant Clerk, Superior Court for Criminal Business
County of Suffolk.

Office-Supreme Court, U.S.
FILED
DEC 31 1964
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 799

RICHARD K. GORDON *et al.*,
PETITIONERS,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

APPENDIX A
(Opinion of the Supreme Judicial Court)

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ADVANCE SHEETS

OPINIONS OF THE SUPREME JUDICIAL COURT

Published under authority of Chapter 402 of Acts of 1935

UNIVERSITY PRESS, 11 LEON STREET, BOSTON 15, MASS.

COMMONWEALTH *vs.* FRANCIS W. KIERNAN & others.[1]

Suffolk. May 13, 1964. — October 5, 1964.

Present: WILKINS, C.J., WHITTEMORE, CUTTER, KIRK, & SPIEGEL, JJ.

Larceny. False Pretences. Conspiracy. Massachusetts Parking Authority. Practice, Criminal, Appeal with assignments of error; Exceptions: saving of exception, failure to save exception; Grand jury proceedings; Suppression of evidence; Examination of jurors; Venue; Conspiracy case; Assent to procedure. *Pleading, Criminal,* Bill of particulars. *Jury and Jurors. Evidence,* Illegally seized material, Conspirator. *Agency,* Agent's fraud, Agent's knowledge.

Indictments tried in the Superior Court before *Quirico,* J.

KIRK, J. The jury returned verdicts of guilty against the defendants on indictments 4018, charging them with larceny from the Massachusetts Parking Authority (Authority),[2] and 4020, charging them with conspiracy to commit larceny from the Authority.[3] In the latter indictment

[1] Richard C. Simmers and Richard K. Gordon are the other defendants. George Lewis Brady (Brady), also named as a defendant in each indictment, was found by the judge to be incapable of standing trial with the defendants.

[2] The Authority was created "a body politic and corporate" by St. 1958, c. 606, § 3, for the purpose of constructing, operating, and maintaining "a garage for motor vehicles under Boston Common." St. 1958, c. 606, § 2 (e).

[3] At the close of the evidence the judge directed verdicts of not guilty on indictment 4022 charging Kiernan alone with extorting money from The Foundation Company, which contracted with the Authority to construct the garage, and on indictment 4021 charging all defendants with conspiracy to

The Foundation Company and two individuals, later to be identified in this opinion, were named as coconspirators but were not named as defendants. The trial was subject to G. L. c. 278, §§ 33A–33G. The case comes to us upon appeals accompanied by twenty assignments of error by the defendants Richard C. Simmers (Simmers) and Richard K. Gordon (Gordon),[4] and twenty-two assignments by Francis W. Kiernan (Kiernan). We have a summary of the record and the transcript of evidence.

We first consider those assignments of error which do not require a detailed recital of the evidence for an understanding of our disposition of them.

1. Without intimating that there is any merit to Kiernan's assignments 1, 2 and 3, relating to the overruling of his pleas in abatement and to the denial of his motion to quash, we do not take cognizance of them because they are not based upon exceptions seasonably saved. *Commonwealth* v. *Gray,* 314 Mass. 96, 102. *Commonwealth* v. *Crowell,* Mass. .[5] The rulings of the judge were entered on June 22 and 25, 1962. The required notices were then given to the parties. The claim of exceptions was filed on July 6, 1962. There was thus a failure to comply with Rule 72 of the Superior Court (1954).[6]

2. Simmers' and Gordon's assignment 1 and Kiernan's assignment 5 challenge the judge's denial of their motions seeking to invalidate the indictments on the ground that the grand jury were prejudiced by adverse publicity prior to the return of the indictments. The subject of the motions was fully considered by this court in *Commonwealth* v. *Geagan,* 339 Mass. 487, 498–501, and the issue was resolved adversely to the defendants. What was said there applies

---

[4] Simmers' and Gordon's assignments 2 and 18 were not argued and are therefore deemed waived. Rule 13 of the Rules for the Regulation of Practice before the Full Court (1952), as amended, 345 Mass. 787.

[5] Mass. Adv. Sh. (1964) 801.

[6] Rule 72 provides in part: "Exceptions to any other . . . ruling . . . made in the absence of counsel shall be taken by a writing filed with the clerk within three days after the receipt from the clerk of notice thereof."

here. Further discussion is unnecessary. There was no error.

3. There was likewise no error in the denial of Kiernan's motions for further particulars (assignment 4). The essentials of both indictments and the bills of particulars relating to them are set out in the footnote.[6] The language of both indictments complies with G. L. c. 277 § 79. *Commonwealth* v. *Carver*, 224 Mass. 42. Each indictment, when read with the corresponding bill of particulars, gave Kiernan fully, plainly, substantially and formally, reasonable knowledge of the crimes with which he was charged. G. L. c. 277, § 40. *Commonwealth* v. *Welansky*, 316 Mass. 383, 395–396. *Commonwealth* v. *Iannello*, 344 Mass. 723, 725–726. He was not entitled to more. The Commonwealth is under no duty to provide a defendant with a summary of

[6] The larceny indictment alleged that the named defendants on March 2, 1960, "did steal money of the amount and of the value in all of four hundred fifty thousand dollars, of the property of the Massachusetts Parking Authority, a body politic and corporate." The Commonwealth's substitute bill of particulars, filed by leave of court after the denial of Kiernan's motion for further particulars, stated that the stealing was from "the Massachusetts Parking Authority Construction Fund Trustee Account in the custody of The First National Bank of Boston, at Boston, Suffolk County, Massachusetts," and that the manner and means were that the "defendant with intent to defraud obtained by false pretenses the making of a check and in consequence and by means thereof and as part of the same transaction by said false pretenses and with said fraudulent intent induced another to part with said check and with money; and thereby obtained said money; said false pretenses being false representations by word and act and by the making, execution and submission of false and fraudulent documents including contracts, bills, requisitions and statements for services and work never performed which were well known to be false and fraudulent by said defendant."

The conspiracy indictment alleged that the same defendants on December 2, 1958, "and on divers other days and times between that day and the day of the presenting of this indictment [May 31, 1962], did conspire together and with The Foundation Company, a corporation duly existing under the laws of the State of New York, William F. Thompson and Maurice A. Broderick, to commit thereafter, from time to time and on different occasions as opportunity therefor should offer and not at times then particularly set and fixed, the crime of stealing money of an amount and value in excess of one hundred dollars, of the property of the Massachusetts Parking Authority, a body politic and corporate." The bill of particulars stated that the place of the conspiracy was "Boston, Suffolk County, Massachusetts, and each and every other place where the opportunity arose to conspire to commit the offense set forth in the indictment," and, as to the manner and means stated that "Each defendant assisted one or more of the other defendants in conspiring to commit the offense set forth in the indictment and more particularly by the certification of a false and fraudulent requisition by the defendant Kiernan and resulting in the stealing of money of an amount and value in excess of $100, the property of the Massachusetts Parking Authority."

its evidence against him. *Commonwealth* v. *Lamm*, 310 Mass. 159, 160–162.

4. Kiernan's assignments 6 and 7 assert that it was error for the judge to deny a pre-trial motion to suppress evidence obtained as a result of an alleged illegal search and seizure and to examine the grand jury minutes to identify that evidence. A motion to suppress is properly made before trial. *Commonwealth* v. *Lewis*, 346 Mass. 373, 382.[b] The judge, however, is not required to make, and in the nature of things cannot be required to make, a decision on such a motion, where, as here, the evidence sought to be suppressed is not identified by the moving party. Nor may he be required to permit counsel before trial to inspect the minutes of the grand jury to ascertain what evidence the Commonwealth has and the means used to obtain it. *Commonwealth* v. *Galvin*, 323 Mass. 205, 211. The judge, however, in denying the pre-trial motion to suppress, expressly reserved Kiernan's right to renew the motion "at an appropriate time before or during trial." Thereafter, during the trial, Kiernan excepted to the admission in evidence and to the refusal to strike from the record a resolution adopted by the Authority, authorizing and approving the execution of a contract with The Foundation Company for the construction of the garage under Boston Common (Kiernan's assignments 8 and 9). Annexed to the admitted resolution was a form of contract approved in writing by Kiernan. Both were admitted as a single exhibit (exhibit 7). Indisputably, no part of exhibit 7 was ever the property of Kiernan and was never taken from him. The contention by Kiernan, made before us for the first time, that the admitted document was the "fruit" of an alleged "illegal seizure" of an executed copy of the same contract is so farfetched as not to merit comment. Apart from the decisive fact that there was no showing of an illegal seizure of Kiernan's copy, there was, from independent sources, abundant evidence of the existence and

[b] Mass. Adv. Sh. (1963) 1009, 1017.

content of the admitted document, executed by the Authority, so as to preclude the possibility of any prejudice to Kiernan from a prior examination, if any, of his executed copy by the prosecution. See *Fahy* v. *Connecticut*, 375 U. S. 85, 86–87.

5. Simmers and Gordon in their assignment 3 and Kiernan in his assignment 10 claim error in the judge's denial of their motions that defence counsel be permitted to interrogate prospective jurors, or in the alternative that the judge propound questions prepared by counsel, to determine if the jurors were impartial. It is clear from our decisions that the questioning of jurors, other than as required by G. L. c. 234, § 28, rests wholly in the discretion of the judge. *Commonwealth* v. *Taylor*, 327 Mass. 641, 646–647. *Commonwealth* v. *Bonomi*, 335 Mass. 327, 333–335. *Commonwealth* v. *Greenberg*, 339 Mass. 557, 566. The judge in fact, however, interviewed each juror separately in open court, informed each of the essentials of the indictments, inquired of each as to the matters embraced in G. L. c. 234, § 28, so far as relevant, and in addition propounded, as the particular situation commended, additional inquiries, including some suggested by counsel. In all respects the judge was meticulous to insure the empanelling of a jury free from bias. See *Commonwealth* v. *Galvin*, 323 Mass. 205, 213; *Commonwealth* v. *Geagan*, 339 Mass. 487, 502–508. There was no error.

6. The judge was not in error in denying Simmers' and Gordon's request (assignment 7) that they be permitted to examine the testimony of a coconspirator before the grand jury to determine if his testimony there was consistent with his testimony at the trial. *Commonwealth* v. *Goldberg*, 212 Mass. 88, 90, 91–92. *Commonwealth* v. *Gettigan*, 252 Mass. 450, 464. We observe, however, that before acting on the request, the judge himself examined the grand jury transcript for this purpose and concluded that there was no inconsistency.

Consideration of the remaining assignments requires that we set out the inevitably extensive evidence produced at the

lengthy trial disclosing a series of involved transactions and events and the substitution or replacement of participants as the alleged conspiracy developed. We preface the detailed narrative with a synopsis of what the evidence shows: a decision by Brady, the chairman of the Authority, to profit illicitly from the construction of the garage; a statement by Brady to the prospective contractor that it would not be awarded the construction contract unless there was coöperation in Brady's plan; the acquiescence or consent of the contractor to the unlawful purpose; the formulation over a period of months of a scheme whereby, upon the execution of the contract, $450,000 of construction funds, ostensibly but falsely in payment for obligations theretofore incurred by the contractor for services in preparation for the construction, would be paid to the contractor; the payment soon thereafter by the contractor of a total of $310,000 to the defendants under the guise of: (1) a finder's fee, (2) an attorney's fee, and (3) a subcontract for work on the garage, when in fact no services or work had been or were to be rendered or performed by the recipients of the money. The details follow.

By St. 1958, c. 606, the Authority was created as an independent body the essential functions of which were to build, operate and maintain a garage for motor vehicles under Boston Common. It was granted the general powers necessary to accomplish its purposes including the powers to "issue Common garage revenue bonds of the Authority," "make and enter into all contracts . . . necessary or incidental to the performance of its duties," and "employ consulting engineers." St. 1958, c. 606, § 5 (f), (l) and (m). Under § 8 of the act the Authority was authorized "to provide by resolution . . . for the issuance of Common garage revenue bonds of the Authority for the purpose of paying . . . the cost of the project," the proceeds of which "shall be used solely for the payment of the cost of the project, and shall be disbursed in such manner and under such restrictions, if any, as the Authority may provide in the resolution authorizing the issuance of such bonds or in the trust

agreement hereinafter mentioned securing the same." The Authority could in its discretion, under § 9 of the act, secure the bonds by a trust agreement with a corporate trustee with such provisions "as the Authority may deem reasonable and proper for the security of the bondholders."

On December 4, 1958, pursuant to St. 1958, c. 606, § 3, Brady was appointed and confirmed as a member of the Authority.[7] He became chairman on May 28, 1959.[8] Just prior to June, 1959, Brady met William F. Thompson (Thompson), a coconspirator but not a defendant, who was chairman of the board of directors of The Foundation Company (Foundation) located in New York, and told him that, if Foundation was to get the contract for the construction of the garage, Foundation would have to pay $300,000 for it. He also said that he understood that Foundation kept a box of cash for such purposes, which Thompson denied. On June 3, 1959, there was a meeting in Boston attended by Brady, Thompson, Chester W. Cambell (Cambell),[9] president of Foundation, a representative of John Nuveen & Company, Inc. (Nuveen), to be selected by the Authority on June 8, 1959, to underwrite the bond issue, and Maurice A. Broderick (Broderick), a coconspirator but not a defendant. Broderick, Brady's brother-in-law, was an attorney licensed to practise in New Hampshire. He attended the meeting at Brady's request to learn what he could about Brady obtaining a "finder's fee." Although Broderick learned nothing about a fee for Brady at the meeting, Thompson there told one Shea, a member of a New York law firm representing Foundation, that he and Cambell had agreed to retain Broderick as counsel for Foundation in Massachusetts for $100,000 and to pay $150,000 as a finder's fee to the party who had brought Brady and Thompson together.

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[7] The Authority consisted of three members, two appointed by the Governor and one by the mayor of the city of Boston.

[8] Brady continued as chairman until his resignation from the Authority on November 17, 1961.

[9] Cambell died before the trial.

Brady, Thompson, and Cambell met in Boston on June 18, 1959. On that day, the Authority voted to accept a proposal dated June 17, 1959, made by Foundation for the contract to build the garage.

At Brady's request Broderick attended a meeting in New York in August, 1959, to learn about Brady's chance of receiving a "fee" of $405,000. Thompson and Shea were present. It was suggested that the "fee" be paid to Brady in three forms: (1) a "finder's fee" of $150,000, (2) an "attorney's fee" of $100,000, and (3) a "subcontract" of $155,000. In November, 1959, Broderick enlisted Edward Plourde (Plourde), a friend for forty years, to act as a straw for Brady in obtaining the "finder's fee." Plourde, in fact, had nothing to do with getting the garage construction contract for Foundation.

On February 20, 1960, Brady and Broderick went to New York where they met Thompson, Cambell, and Gordon Morrison (Morrison),[10] the treasurer of Foundation. Thompson dictated three letters. Each letter was predated and signed by Cambell as president of Foundation. The first letter, predated to May 4, 1959, was addressed to Plourde and stated that if Foundation obtained "a contract for construction in the State of Massachusetts within a period terminating two years from [that] date, we agree to pay you . . . a fee equal to 2 per cent of the gross contract price . . . [but] if your fee should amount in total to more than $150,000 on any job, we will pay you upon our signing of the contract . . . $100,000 . . . and . . . the remainder of the fee to be paid you will be in proportion to the payments we receive from the owner." The second letter, predated to June 17, 1959, was addressed to Broderick and stated: "We will pay you [for legal services rendered and to be rendered for the garage and other projects] the sum of . . . [$50,000] upon receipt of our mobilization item. $15,000 60 days thereafter. The balance of $35,000, February 1, 1961." In fact, no legal services were to be rendered

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[10] Morrison died before the trial.

by Broderick. The third letter, predated to February 11, 1960, was addressed to the Granite State Realty and Construction Co., Inc. (Granite), a New Hampshire corporation with no assets, which had been formed in April, 1959, by Broderick who was its president, treasurer, clerk, and director. The letter stated that it was the intention of Foundation "to enter into a contract with . . . [Granite] upon our obtaining a contract with the Massachusetts Parking Authority to carry out the following work for us on our project, 'Underground Garage Located under Boston Common' as follows: 1. We will pay you to construct four construction buildings for the sum of $40,000. 2. . . . to construct certain fences . . . $25,000. 3. . . . to construct four kiosks . . . $40,000. 4. . . . for . . . construction equipment and [supplies] . . . $50,000." In fact, no construction work of any kind was done, and no materials or equipment were furnished by Granite to Foundation.

On February 23, 1960, three days after the letters just described were signed in New York, the Authority met in Boston, and, exercising the powers conferred upon it by St. 1958, c. 606, adopted a series of resolutions, all signed by Brady and the other two members of the Authority. One of these resolutions provided that the firm of Muzzillo and Tizian be designated construction engineer. Kiernan was a member of this firm and acted for it in all matters relating to the construction of the garage. Another resolution authorized and approved the contract with Foundation for the construction of the garage at the price of $7,500,000. The contract attached to this resolution bore, as required by the resolution, Kiernan's signature following the words "Within contract hereby approved, Muzzillo and Tizian." The contract provided, in part, as follows: "The Authority shall pay for . . . all work to be performed by contractor . . . the amount of $7,500,000, which sum shall be paid as follows: 6 per cent [i.e. $450,000] of the total of the above amount shall be paid to the contractor on the effective date of this contract *as payment for architectural and engineering services heretofore rendered by the contractor in con-*

nection with the project" (emphasis supplied). Still another resolution, called the bond resolution, authorized the Authority to issue revenue bonds not exceeding $9,600,000 for the purpose of financing the project. This resolution created a special trust fund that was to be "deposited with and held by the Construction Fund Trustee" (Trustee), designated to be The First National Bank of Boston (First National), and to be "held in trust and applied only for the payment of the cost of the Project . . . ." The Trustee, under this resolution, could make payments only upon the filing by the Authority of "(A) a requisition, signed by an authorized Officer of the Authority, stating in respect to each payment to be made: (1) the item number of the payment; (2) the name of the person to whom payment . . . [was] to be made; (3) the amount to be paid; (4) the purpose, by general classification, for which the payment . . . [was] to be made; (5) that obligations in the stated amounts . . . [had] been incurred by the Authority, and *that each item thereof . . . [was] a proper charge against moneys in the Construction fund . . .*" and "(C) . . . *a certificate, signed by the Construction Engineer and attached to such requisition, certifying their approval thereof and further certifying that* each such obligation . . . [had] been properly incurred and . . . [was] due and unpaid and that, *insofar as such obligation was incurred for work . . . such work was actually performed . . . in furtherance of the construction of the Project* . . . . Upon receipt of each such requisition and all required accompanying certificates, the Construction Fund Trustee shall pay each such item from the Construction Fund directly to the person entitled thereto . . ." (emphasis supplied).

Finally, on the same day, the Authority formally resolved to accept Nuveen's bond purchase contract proposal which provided for simultaneous payment for and delivery of the bonds at Chemical Bank, New York Trust Company of New York City (Chemical Bank). This bond purchase contract, signed at the meeting by Brady, was expressly made subject to the condition that "[a]t the time of the

closing, the Authority shall have entered into a legal and binding contract . . . for the construction of the Boston Common Garage . . . *which contract shall provide that the time of construction shall commence upon* the date of delivery of the bonds to . . . [Nuveen] and payment therefor and *the payment by the Authority to The Foundation Company of the initial payment for architectural and engineering services theretofore rendered . . .*" (emphasis supplied).[11]

The closing, i.e., the sale of the bonds, took place in New York on March 2, 1960. Present were Brady, Thompson, Cambell and others from the Authority and from Foundation, as well as Kiernan for Muzzillo and Tizian, Walter N. Burnett (Burnett), an officer of First National, and representatives from Nuveen and Chemical Bank. The construction contract between the Authority and Foundation was signed by Brady and Kiernan, among others. It contained the same provision as the contract originally authorized and approved in Boston by Brady and Kiernan, "*Six per cent* [*i.e. $450,000*] *of the total of the above amount* [*$7,500,000*] *shall be paid to the Contractor on the effective date of this contract as payment for architectural and engineering services heretofore rendered by the Contractor in connection with the Project*" (emphasis supplied). On the date of the closing costs of only $35,246.44 had in fact been allocated by Foundation to the garage project. Brady delivered to Nuveen $9,600,000 worth of Boston Common Garage revenue bonds for which Nuveen paid $9,330,200, giving to Brady a check payable to the Authority for $7,732,800[12] which Brady indorsed for the Authority and delivered to Burnett who, having accepted for First National the powers and duties of Trustee, deposited it in Chemical Bank in First National's account for the ac-

[11] This is the "mobilization item" mentioned in the fictitious contract for legal services prepared by Thompson on February 20, 1960.

[12] The difference between $9,330,200 and $7,732,800 is accounted for by First National's deposit of $1,597,400 in Chemical Bank, as Sinking Fund Trustee, from which fund interest on the bonds would be paid until the garage became operative at which time interest would be paid from the revenue received.

count of the Massachusetts Parking Authority Construction Fund (construction fund). Requisition 1, containing two items, namely, (1) $200,000 payable to the Commonwealth, and (2) $450,000 payable to Foundation, was taken by Burnett from Boston to New York, where it was signed by Brady and another member of the Authority. In New York the following specifications were added: as to item (1) "Reimbursement of Commonwealth pursuant to Section 18, Chapter 606 Mass. Acts of 1958,"[13] and as to item (2) *"Payment for architectural and engineering services as required by Construction Contract"* (emphasis supplied). Kiernan's certificate approving the payments and certifying that the services had been "actually performed," was attached to the requisition. Later, on the same day, Burnett, to honor the requisitions, withdrew from the construction fund account $200,000 payable to the Commonwealth and $450,000 payable to Foundation. He presented a check for the latter amount to Cambell who immediately deposited it to Foundation's account in the Chase Manhattan Bank in New York. Accompanying this check was a letter from First National to Foundation stating that the check was "in payment on behalf of The Authority *for architectural and engineering services heretofore rendered by you in connection with the construction of the Boston Common Garage project"* (emphasis supplied).

We now turn to the sequence of events whereby funds were moved from Foundation's account to the defendants. They begin on March 2, 1960, the day of the closing. First, the finder's fee. Broderick and Plourde went to Foundation's office where they met Morrison and Thompson, who gave Plourde a check for $100,000 in accordance with the letter predated May 4, 1959. On March 3, 1960, Plourde deposited the check in an account in his name in the Manufacturer's Trust Company (Manufacturers Trust) in New York.

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[13] This sum was appropriated "for the preliminary expenses of the Authority in carrying out the provisions of this act," and was to be repaid out of the proceeds and upon the delivery of the bonds.

Soon thereafter Broderick and Plourde met Kiernan and Brady in a New York hotel where Brady, in the presence of the others, told Plourde that the cash for the "finder's fee" was to be turned over by Plourde to Simmers.[14] Broderick and Plourde then met with Thompson, Morrison, and Cambell. Plourde received Foundation's check for $45,000 drawn on the Chase Manhattan Bank and signed by Thompson and Morrison. Thus Foundation completed its commitment under the fictitious finder's fee contract.[15] Plourde deposited the $45,000 check in his account at Manufacturers Trust where he had previously deposited the $100,000 check, and then, upon Brady's direction, made out two checks, one for $95,000 and the other for $45,000, both payable to Simmers. Plourde retained $5,000 for his own services.

On April 1, 1960, Broderick, at Brady's request, sent Plourde to New York where he met Brady, Kiernan, Simmers, Gordon, and John J. Craven (Craven). Simmers and Gordon were law partners. Craven was a friend of Gordon and had come to New York on the representation that he was to act as a straw for Gordon in a "real estate transaction." Brady, Kiernan, and Plourde met Simmers, Gordon, and Craven at a New York restaurant where Kiernan destroyed the two checks which Plourde had made out to Simmers. All, except Brady, then proceeded to Manufacturers Trust where, pursuant to earlier instructions by Brady, Plourde drew a check for $140,000 payable to Craven who immediately presented it to the bank for payment. Simmers left to buy a brief case and returned. One hundred $1,000 bills and eighty $500 bills were produced by the bank and counted by Craven and Kiernan in the presence

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[14] The rather abrupt appearance on the scene of Simmers, and shortly thereafter of Gordon and one Craven, as replacements for Broderick and Plourde, is in part probably accounted for by a dispute between Broderick and Brady about Plourde. Brady wanted the "finder's fee" to come to him from Plourde in cash, but Broderick did not wish to have Plourde left, as a result, with an income tax problem. Broderick also told Brady that the compensation which Brady proposed to give to Plourde for acting as a straw was too small.

[15] The difference between the price set in the "finder's fee" contract ($150,000) and the amount Plourde actually received ($145,000) is accounted for by a $5,000 "discount" for early payment.

of Simmers, Gordon and Plourde in a small anteroom. Simmers placed the money in the brief case. Kiernan carried the brief case to a hotel where all once again met. There Brady and Kiernan counted the money and returned to Plourde the empty brief case. Gordon, later that day, gave Craven one of the $500 bills as payment for his assistance.

Second, the contract for legal services. On April 19, 1960, Broderick received from Foundation a check for $50,000, the first instalment under his fictitious contract for legal services set out in the letter predated June 17, 1959. In accordance with instructions from Brady, who told Broderick that Gordon was to take over the "attorney's contract," Broderick returned the check to Thompson with a letter, predated February 1, 1960, relinquishing his interest in that "contract" and assigning it to Gordon. Foundation, on April 26, 1960, sent three checks, totalling $100,000 and signed by Thompson and Morrison, to Gordon who acknowledged receipt of the checks in payment for services purportedly to be rendered under the "attorney's contract." One of the checks (for $15,000) was cashed by Gordon. The other two (totalling $85,000) were deposited for collection. When they had cleared, Gordon, with Simmers, withdrew the $85,000 (five $10,000 bills and three hundred and fifty $100 bills); both counted it at the bank; Simmers put it in his pocket, and both left the bank. There was no evidence from any source that Broderick, Simmers or Gordon had rendered or expected to render any legal services to Foundation.

Third, the subcontract. On April 26, 1960, the same day that he assigned his "attorney's contract" to Gordon, Broderick also assigned in blank all his interest in Granite, resigned all his offices in it, and gave the corporate records to Brady. In due course Foundation issued a "purchase order" to Granite for the construction of four construction buildings for $40,000 in accordance with the fictitious subcontract embraced in the letter predated February 11, 1960. Pursuant to the purchase order, Morrison, on June 8, 1960,

told the assistant treasurer of Foundation, one Liggett, to draw a check for $40,000 to Granite saying, "It is going on up there to the Forty Thieves." Thompson and Morrison signed the check, which was indorsed by Gordon as treasurer of Granite and was deposited in an account opened in the name of Granite on June 17, 1960, in a bank located in Andover. On August 1, 1960, Granite sent to Foundation a statement that there was due $25,000 for the construction of fences and $40,000 for the construction of four kiosks. Foundation sent a check for $25,000 to Granite on March 3, 1961, signed by Thompson and Morrison. This check was indorsed by Simmers and Gordon as officers of Granite and was deposited by them on April 20, 1961, in the Granite account.[16] The bank in Andover had also been used earlier by Gordon to deposit part of the "fee" for the "attorney's contract." Signature cards for the Granite account were signed by Simmers and Gordon as officers of the corporation. Simmers and Gordon withdrew over $45,000 of the sum deposited. No work had been done by Granite under the "subcontract."

The evidence shows no use or disposition of the funds after they reached the defendants.

We resume our consideration of the assignments of error and deal with them in the order which will best avoid repetition of the evidence in the application of the law.

7. All of the defendants contend that the judge should have directed verdicts for them on the larceny indictment, and assign numerous grounds one of which is that the evidence was insufficient to support verdicts of guilty (Kiernan's assignment 18, Simmers' and Gordon's 11). To constitute the crime of larceny by false pretences "it must appear that there was a false statement of fact known or believed by the defendant to be false, made with the intent that the person to whom it was made should rely upon its truth, and that such person did rely upon it as true and

[16] There is no evidence that Foundation ever paid the $40,000 ostensibly due for the construction of the kiosks or the $50,000 ostensibly due for construction equipment and supplies.

parted with personal property as a result of such reliance." *Commonwealth* v. *Green,* 326 Mass. 344, 347–348. *Commonwealth* v. *Barrasso,* 342 Mass. 680, 683. *Commonwealth* v. *Louis Constr. Co. Inc.* 343 Mass. 600, 604.

We deal first with Kiernan. The evidence shows not only that there was a false pretence, but warrants a finding that Kiernan knowingly participated in the making of it. The statement, appearing in the construction contract, in the bond purchase contract, and in requisition 1, that $450,000 was due Foundation "for architectural and engineering services" rendered before the construction contract was executed, was a false statement. Only $35,246.44 had in fact been expended by Foundation at the time of the closing. That its falsity was known to Kiernan could be inferred from several circumstances, weighed collectively, among which are the following: The statement, apparently the first in writing made or subscribed to by Kiernan in his capacity as construction engineer, concerned a matter about which he, under the bond resolution, was required to have personal knowledge at the time the statement was made. It also related to a factual situation which could be readily verified by him. And yet, as construction engineer he had approved in writing in Boston on February 23, 1960, the contract containing the statement; in the same capacity he had certified in New York on March 2, 1960, for attachment to requisition 1, that the charge of $450,000 properly had been incurred and that the architectural and engineering services actually had been performed. The jury could find that his subsequent conduct was not reasonably reconcilable with innocent mistake or gullibility in making the statement. He was present shortly after March 2, 1960, when Brady told Plourde that the sum which was to come to Brady in cash for the "finder's fee" should go through Simmers; he later destroyed the two checks which Plourde had originally made payable to Simmers; he was present when the "finder's fee" was received from the straws; he carried the $140,000 in cash from the bank to the hotel; he, once with Craven, and once with Brady, counted the

$140,000. The jury could conclude that the proximity in time between the filing of requisition 1 by the Authority and the payment by Foundation of $140,000 which, with Kiernan's help, reached Brady in cash, established a connection between the two events and reasonably foreclosed the hypothesis of Kiernan's innocence in the making of or subscribing to the statement which was false in fact.

The jury could reasonably infer from all the relevant circumstances that Kiernan knew and intended that the Authority in filing requisition 1 would rely upon the false statement in the contract and in his certificate and that First National upon presentation of the requisition would part with the money. *Commonwealth* v. *Iannello*, 344 Mass. 723, 736, and cases cited. The evidence shows that the Authority did file the requisition in reliance upon the false statement, which could be found to be a decisive or material influence in causing the Authority to direct First National to release the money. See *Commonwealth* v. *Morrison*, 252 Mass. 116, 125; *Commonwealth* v. *Jacobson*, 260 Mass. 311, 327. That Brady, an agent of the Authority, also had knowledge of the falsity of the statement does not aid the defendants since the knowledge of a faithless agent will not be imputed to his principal in a case such as this one, because "[i]t would be absurd if the law should pronounce it impossible for an agent to deceive and defraud his principal . . ." by his own acts or by the acts of a confederate. *Commonwealth* v. *Mulrey*, 170 Mass. 103, 106.[17] Nor does it help the defendants that, although the false statement was made to the Authority, it was First National that parted with the money. See *Commonwealth* v. *Call*, 21

[17] There is no substance in the argument raised by Simmers' and Gordon's assignment 13 and Kiernan's assignment 19 that the judge, after charging the jury with respect to the law on the nonimputability of the guilty knowledge of an agent to his principal, erred by misleading the jury into thinking that the defendants had the burden of proving that the Authority did *not* rely upon the false statement. The judge, at different times, correctly charged that the Commonwealth had the burden of proving every element of the crime including the element of reliance, and then, after instructing the jury on the "faithless servant rule," reiterated: "The burden is still on the Commonwealth to prove beyond a reasonable doubt that the Authority did rely upon [the false statement]."

Pick. 515, 520. All that is necessary to establish larceny by false pretences is proof that a "false statement . . . [was] made, with the intention to commit a fraud, and money or property . . . [was] thereby obtained." *Commonwealth* v. *Johnson*, 167 Ky. 727, 733.

The evidence thus supports Kiernan's conviction on the larceny indictment. It points to his presence and collaboration in the main scheme of the larceny at the beginning, and points thereafter particularly to his active participation at each significant step in the process of collecting the fictitious finder's fee until it was reduced to his and Brady's possession.

8. Although the evidence as to Simmers and Gordon discloses no overt act by them until after First National, relying upon the fraudulently induced requisition of the Authority, had transferred the $450,000 from the Authority's construction fund to Foundation, it shows that thereafter their roles, clearly inferable as being the result of careful prearrangement, were important in completing the larceny. Foundation, holding funds which rightfully belonged to the Authority, served as a cache and a colorably legitimate conduit for the distribution of the funds to the defendants behind the screen of the three sham claims. The parts played by Simmers and Gordon in getting the cash into their own hands under the spurious subcontract and attorney's fee, and in assisting in getting the cash into Brady's and Kiernan's hands under the guise of a finder's fee, constituted a series of steps toward the consummation of the crime of larceny in which the first step was the false pretence written in the resolutions and in the contract in Boston on February 23, 1960.

Simmers and Gordon have argued that the crime of obtaining money by false pretences was committed when First National transferred the $450,000 from the Authority's construction fund to Foundation. From a strictly technical point of view the argument has plausibility. We decline to rule, however, that in the circumstances disclosed the Commonwealth must be compelled to hinge the theory

of its prosecution at that precise point in the sequence of events planned by the defendants, with the conceivable technical result that Simmers and Gordon could not be held as principals to the larceny. It is clear that the criminal design, from its inception, contemplated that the funds, through Foundation, should reach Brady's hands or the hands of persons designated by him, and that only when that result had been achieved would the enterprise, i.e., the larceny, be complete. And, indeed, it was only when that result was achieved that the essential larcenous nature, i.e., the animus furandi, of the plan became clear and demonstrable. Simmers and Gordon knowingly coöperated to advance the plan through that decisive stage. They accomplished with animus furandi the asportation of the funds both in New York and in Massachusetts. See *Commonwealth* v. *Rand,* 7 Met. 475, 477; *Commonwealth* v. *Parker,* 165 Mass. 526, 538–539. In so doing, they were acting in concert with others for a common purpose, to get money for their own benefit, and accordingly could be found guilty of larceny of the money which was fraudulently obtained by means of a false representation. *Commonwealth* v. *Aronson,* 312 Mass. 347, 352, and cases cited. The situation here presented is not one where there is a succession of separate and distinct offences accomplished by one defendant acting as to each in concert with a different confederate with the result that the latter would not be guilty of offences committed prior to his participation. See, for example, *Commonwealth* v. *Greenberg,* 339 Mass. 557, 575–577. Rather we have here a single offence, accomplished in stages, in one or more of which Simmers and Gordon participated with felonious intent, and hence were guilty of the substantive crime charged. The Commonwealth's pleadings and evidence competently meet and encompass the offence as it was conceived and executed by the defendants.

9. Kiernan's assignments 18 and 20 and Simmers' and Gordon's 14, 15, and 17 are predicated upon the contention that the defendants were entitled to directed verdicts because the Commonwealth failed to show that the money

allegedly stolen was the property of the Massachusetts Parking Authority as set out in the indictments and bills of particulars. This contention cannot prevail. General Laws c. 278, § 9, provides: "In the prosecution of crimes which relate to or affect . . . personal estate, *it shall be sufficient, and shall not be a variance, if it is proved on the trial that, at the time when the crime was committed, either the actual or constructive possession or the general or special property in* the whole or *any part of such . . . personal estate was in the person* or community *alleged to be the owner thereof*" (emphasis supplied). The purpose of this section is not to compel the Commonwealth to name correctly, at its peril, the true owner of the property allegedly stolen, but rather is to "avoid the effect of objections as to the allegation of ownership." *Commonwealth* v. *Norton*, 11 Allen, 110, 111. An averment and a showing that a possessory or other property interest in the thing stolen is in someone other than the thief and proof that the thief knew that he had no right to the property taken are sufficient.

Although First National and Chemical Bank had financial interests in the garage project which for present purposes we need not define, it is clear that the Authority had a special property, cognizable under the statute, in the construction fund from which the $450,000 was illicitly drawn and passed through Foundation, as a conduit, to the defendants. The following considerations lead to this conclusion. The sole purpose of the construction fund was to pay the cost of the project entrusted to the Authority. First National, the depository, could not release the funds except in strict compliance with the requirements laid down by the Authority in the bond resolution, quoted earlier in this opinion. These requirements included the presentation of properly executed requisitions which only the Authority had the right to submit. When a properly executed requisition was submitted to First National it was obliged to honor it. The Authority had the power, under the bond resolution, to remove First National as trustee for cause and to appoint a

successor. The Authority had the right to determine when and in what amounts the money held by First National should be invested, and First National was required to keep the Authority informed at all times as to the details of all investments made for the credit of the construction fund. These elements of control constitute a special property in the Authority sufficient to sustain the allegation of ownership. See *Commonwealth* v. *Fitzgerald*, 164 Mass. 587; *Commonwealth* v. *McDonald*, 187 Mass. 581.

10. In further support of their assignments relating to the denial of their motions for directed verdicts on the larceny indictment, the defendants Simmers and Gordon contend that the venue of the offence does not lie in Suffolk County. They cite G. L. c. 277, § 58, which provides: "Larceny, whether at common law or as defined by section thirty of chapter two hundred and sixty-six,[18] may be prosecuted and punished in any county where the defendant had possession of the property alleged to have been stolen." They argue that there was no evidence that any of the defendants had possession in Suffolk County of the property alleged to have been stolen, and contend that, in consequence, the venue is wrong. The Commonwealth, on the other hand, cites G. L. c. 277, § 59, which provides: "The crime of obtaining money . . . by a false pretence . . . may be alleged to have been committed, and may be prosecuted and punished, in any county where the false pretence was made, written or used . . . by the defendant." It contends that if it has proved that a false pretence was made, written or used by the defendants in Suffolk County, the venue is proper. If this were a case of first impression we should have no hesitation in reaching the conclusion that by the plain terms of G. L. c. 277, § 59, the Commonwealth's contention is correct. We are confronted, however, with *Commonwealth* v. *Friedman*, 188 Mass. 308, where the court in a short opinion construing the predecessor statutes of G. L.

[18] General Laws c. 266, § 30, provides in part: "Whoever steals, or with intent to defraud obtains by a false pretence . . . the property of another . . . shall be guilty of larceny . . . ."

c. 277, § 58 (R. L. c. 218, § 47), G. L. c. 277, § 59 (R. L. c. 218, § 48), and G. L. c. 266, § 30 (R. L. c. 208, § 26), held that on an indictment charging larceny, where the proof was that the larceny was effected by a false pretence, the prosecution could be had only in a county in which the defendant had possession of the property alleged to have been stolen.

The Commonwealth has argued the point exhaustively and asks us to reconsider the *Friedman* case. A discussion of each of the several persuasive arguments which the Commonwealth has marshalled in support of its contention that the *Friedman* case is wrong would unduly prolong this opinion. We think it is sufficient to point out that there was, in our judgment, a fundamental misconception in the *Friedman* case which led to an erroneous result. In the *Friedman* case, as in the case before us, the indictment was brought under the general larceny statute (R. L. c. 208, § 26), now G. L. c. 266, § 30. The court held, however, that the only venue statute which was applicable to the general larceny statute was the limited venue statute (R. L. c. 218, § 47), now G. L. c. 277, § 58, which requires a showing that the defendant had possession of the stolen property in the county where he is being prosecuted. The court expressly excluded the applicability of the broad venue statute (R. L. c. 218, § 48), now G. L. c. 277, § 59, quoted in the preceding paragraph of this opinion. The fact is, however, that the "crime of obtaining money . . . by a false pretence" was, at the time the *Friedman* case was decided, defined only in the general larceny statute (R. L. c. 208, § 26), now G. L. c. 266, § 30. If, therefore, the broad venue statute (R. L. c. 218, § 48) was to have any meaning at all, it must have been the intention of the Legislature that it apply to the statute which alone defined the crime of obtaining money by a false pretence, namely, R. L. c. 208, § 26 (now G. L. c. 266, § 30).[19] We so hold. *Commonwealth* v. *Friedman*,

[19] We do not overlook the fact that R. L. c. 208, § 27 (now G. L. c. 266, § 31), defining the crime of false pretences by the fraudulent obtaining of "the signature of a person to a written instrument," was also extant at the time of the *Friedman* decision. That statute, however, was expressly made subject to the provisions of R. L. c. 218, § 48 (now G. L. c. 277, § 59).

188 Mass. 308, may be considered overruled. The legislative history of the general larceny statute and the related venue statutes tends to confirm our conclusion and is set out in the footnote.[20]

We perceive no inconsistency or contradiction in having more than one venue statute applicable to a general larceny statute. General Laws c. 277, § 58, fixes a common basis (the possession of stolen goods) for the venue of crimes indictable under G. L. c. 266, § 30. The provision for a common basis does not, in our judgment, preclude the application of other bases which are specifically designed to facilitate the prosecution of a particular offence, such as the one before us which, although embraced within the general larceny statute, is commonly accomplished by an elusive modus operandi. "Larceny, as defined by our statutes, includes the obtaining of personal property by criminal, false pretences." *Commonwealth* v. *Carver*, 224 Mass. 42, 44-45.

11. The evidence was sufficient to show that a false pretence was "made, written or used" in Suffolk County, as required by G. L. c. 277, § 59. While it is true that the three predated letters which ostensibly were for the finder's fee,

[20] The crimes presently included under the general larceny statute were originally defined by separate statutes, i.e., simple larceny (Pub. Sts. c. 203, § 20), embezzlement (Pub. Sts. c. 203, § 37), and false pretences (Pub. Sts. c. 203, § 59). Correspondingly, there were, except for simple larceny, separate venue statutes applicable to each crime, i.e., embezzlement (Pub. Sts. c. 213, § 20), and false pretences (Pub. Sts. c. 213, § 21). The latter statute provided that: "The offence described in section fifty-nine of chapter two hundred and three may be alleged to have been committed, and may be prosecuted and punished, in any county in which the false pretence or the privy or false token was made, written, or used . . . ." The three crimes were subsequently consolidated under a general larceny statute (R. L. c. 208, § 26). Accordingly, Pub. Sts. c. 213, § 20, was amended by R. L. c. 218, § 47, to include a general venue provision for all three crimes under the consolidated larceny statute, instead of providing only for venue under the crime of embezzlement. This amended section has remained unchanged and is now G. L. c. 277, § 58. On the other hand, the venue statute relating to false pretences (Pub. Sts. c. 213, § 21), although slightly amended when the consolidated larceny statute was passed (R. L. c. 218, § 48), remained substantially the same. It has not been amended since 1902 and is now G. L. c. 277, § 59. By not repealing this broad venue section after having enacted, in effect, a limited venue statute to govern the new consolidated larceny statute, the Legislature manifested an intent to have R. L. c. 218, § 48 (now G. L. c. 277, § 59), continue to govern the crime of larceny by false pretences even though that crime had been brought under the consolidated larceny statute.

the attorney's fee and the Granite subcontract were written in New York on February 20, 1960, these were merely devices to shift the money, according to plan, to the defendants through Foundation as a conduit. The effective false representations were made or written in Boston. The series of resolutions adopted by the Authority on February 23, 1960, were written and signed in Boston. Brady's signature was on all of the resolutions. In Boston Kiernan, over his signature, approved the contract annexed to the resolution designating Foundation as the contractor for the garage. In Boston Brady signed the bond purchase contract with Nuveen. These instruments provided for the payment by the Authority to Foundation for "architectural and engineering services . . . [theretofore or heretofore] rendered" by Foundation. On the evidence the jury, as already indicated, unquestionably could find that the statements (that architectural and engineering services had been rendered to Foundation) when written in Boston were false, and known by Brady and Kiernan to be false. The documents which were signed in New York contained the same false representation as the documents signed in Boston, were based upon the latter, and were "equally false and aimed at the same result." *People ex rel. Phelps* v. *Court of Oyer & Terminer County of N. Y.* 83 N. Y. 436, 453. *Commonwealth* v. *Iannello,* 344 Mass. 723, 737, and cases cited.

12. We turn to the conspiracy indictment and consider first the assignments relating to the denial of the defendants' motions for directed verdicts (Kiernan's assignment 18 and Simmers' and Gordon's assignment 12). The settled principles which are determinative of conspiracy as a common law crime are set out in the cases cited and discussed in *Commonwealth* v. *Beal,* 314 Mass. 210, 221-222, and need not be repeated. Contrary to the contention of the defendants that the evidence was insufficient to convict, there was ample evidence, already recounted, that there was "a combination of two or more persons [who], by some concerted action, [sought] to accomplish some criminal or unlawful

purpose . . . .'' *Commonwealth* v. *Hunt*, 4 Met. 111, 123. See *Attorney Gen.* v. *Tufts*, 239 Mass. 458, 493. Each defendant knew or communicated with other coconspirators, all of whose efforts were directed to the common object of stealing money from the Authority. *Commonwealth* v. *Smith*, 163 Mass. 411, 417–418. Simmers' and Gordon's participation, though relatively late, was during the course of the conspiracy and in furtherance of its purpose, and made them parties to it. *Commonwealth* v. *Corcoran*, 252 Mass. 465, 487. *Commonwealth* v. *Beal*, 314 Mass. 210, 221–222. See *Attorney Gen.* v. *Tufts*, 239 Mass. 458, 493–494. In short the acts and statements of each of the defendants were sufficient to connect each with the conspiracy so that the acts and declarations of all the coconspirators in pursuance of the common design, whether in their presence or absence, were admissible against them, and in their total force warranted verdicts of guilty on the conspiracy indictment. *Commonwealth* v. *Benesch*, 290 Mass. 125. ''[C]onspiracies involving such elaborate arrangements generally are not born fullgrown. Rather they mature by successive stages which are necessary to bring in the essential parties. And not all of those joining in the earlier ones make known their participation to others later coming in. . . . Secrecy and concealment are essential features of successful conspiracy. The more completely they are achieved, the more successful the crime. Hence the law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details or of the participation of others. Otherwise the difficulties, not only of discovery, but of certainty in proof and of correlating proof with pleading would become insuperable, and conspirators would go free by their very ingenuity.'' *Blumenthal* v. *United States*, 332 U. S. 539, 556–557. See *United States* v. *Stromberg*, 268 F. 2d 256, 266 (2d Cir.).[21]

[21] The defendants in their briefs have quoted from opinions of the Supreme Court of the United States in which some of the justices inveigh against the

13. Simmers and Gordon in assignments 4, 5, 6, and 19 and Kiernan in assignments 11, 12, 13, 14, and 15 contend that the judge, in admitting testimony of declarations of a conspirator in the absence of a defendant, failed to give adequate instructions, at the time the testimony was admitted, limiting the effect of the declaration to the declarant. There are several reasons which make this contention untenable as applied to the case before us. For one, the briefs of the defendants point to no instance where, upon the admission of the evidence, the judge, when requested and where it was proper to do so, failed to give an appropriate instruction to the jury limiting the effect of the evidence. Further, our examination of the transcript reveals that counsels' requests for instructions of the type indicated were made almost exclusively on the first day of the trial, which was mainly devoted to the introduction of documentary evidence. It appears also that on the second day of the trial when Broderick, the first of the coconspirators to take the stand, began his testimony, the judge initiated a conference with counsel concerning the manner in which the conspiracy case would be tried. The judge indicated a proper concern that with several alleged conspirators there was the danger, despite instructions limiting the effect of testimony, that the jury might unwittingly carry over the testimony of one or more witnesses to affect a defendant as to whom it was excluded and thus result in his conviction when his guilt might otherwise not be established in the minds of the jury. See *Blumenthal* v. *United States*, 332 U. S. 539, 559-560. After extended discussion, and upon the formal and unequivocal representation by the prosecutor to the judge that the Commonwealth would produce evidence which would warrant the jury in finding that a conspiracy did exist and that each of the defendants became parties to the conspiracy, the judge ruled that he

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practice of Federal prosecutors initiating conspiracy prosecutions in cases where the substantive crimes could readily be proved without an indictment for conspiracy, and point out the risks of convicting the innocent. *Krulewitch* v. *United States*, 336 U. S. 440. *Lutwak* v. *United States*, 344 U. S. 604. The quoted language has no relevance to the case before us.

would admit the testimony of the coconspirators against all of the defendants unless he otherwise indicated, that the defendants could now make a "blanket objection" to the testimony, and that he would save their "blanket exception" to its admission. He likewise reserved the defendants' right to strike the testimony if the evidence fell short of the representations made by the prosecutor, whose opening statement to the jury had outlined fully the nature and scope of the evidence which would be forthcoming in support of the indictments. The procedure adopted by the judge, although a modification of the procedure commonly followed in the trial of conspiracy cases,[22] was but an application of a trial practice permissible under our decisions. *Commonwealth* v. *Dyer*, 243 Mass. 472, 507, citing *Attorney Gen.* v. *Pelletier*, 240 Mass. 264, 312–314.

Finally, the defendants took no exception to the procedure adopted by the judge. On the contrary, the whole tenor of the transcript bespeaks their acquiescence in it. Of the hundreds of exceptions saved to the overruling of objections to questions asked of witnesses, none was based on the procedure which was being followed or on the ground that limiting instructions were not given. The defendants having assented to the adoption of a recognized procedure cannot now be heard to complain. See *Dalton* v. *Post Publishing Co.* 328 Mass. 595, 598–599. In contemplation of the setting in which the trial was conducted no duty devolved upon the judge in the absence of a request to give repetitious instructions limiting the effect of particular bits of testimony. No error has been shown.

14. Cognate to the point just discussed was the denial by the judge of Kiernan's motions to strike the testimony

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[22] In *Commonwealth* v. *Benesch*, 290 Mass. 125, 132–133, Qua, J., said, "the manner in which conspiracy cases are customarily tried [is] by allowing in the first instance as against each defendant separately evidence of such acts, knowledge and admissions as appear to affect the particular defendant and then, when sufficient evidence has accumulated to support a fair inference of the existence of a conspiracy, by removing the limitation, so that evidence of the acts, knowledge and admissions of all who are found to have joined in the conspiracy, during the course of and in pursuance of the conspiracy, becomes applicable against all the conspirators."

of witnesses as to declarations of alleged coconspirators in Kiernan's absence (Kiernan's assignment 22). The denial of the motions imported a finding by the judge that the Commonwealth had fulfilled its promise as to the proof which would be produced to support the indictments and was implicitly a ruling by the judge that (a) sufficient evidence had been adduced to support a fair inference that a conspiracy existed; and (b) the state of the evidence was such that the jury could find that each of the defendants had joined in the conspiracy with the result that evidence of the acts, knowledge and admissions of all who were found to have joined in the conspiracy became evidence against all of the defendants. *Commonwealth* v. *Benesch,* 290 Mass. 125, 132–133. There was no error.

15. Simmers' and Gordon's assignment 10 and Kiernan's assignment 21 assert that it was error for the judge to refuse to strike Liggett's testimony that Morrison, when directing him to draw the $40,000 check payable to Granite, said that it was "going on up there to the Forty Thieves." Although Morrison was not named in the indictment as coconspirator, there was evidence warranting a finding that at the time he made the statement he was himself a coconspirator. He had been present when Thompson dictated and Cambell signed the predated letters for the finder's fee, the attorney's fee and the subcontract with Granite. He was a cosigner for Foundation of the several checks which at the time he made the statement had been issued in payment of these spurious undertakings. Chronologically, he made the statement when the conspiracy was approaching but had not reached its full fruition, after the finder's fee and the attorney's fee had already been paid over his signature. The statement was therefore a declaration of a coconspirator made in connection with an act done in the course of and in furtherance of the conspiracy, as well as an admission of his awareness of the criminal nature of the transaction, and was admissible against all who were his coconspirators. *Commonwealth* v. *Riches,* 219 Mass. 433, 438–439. That Morrison was not named in the indictment

does not affect the competency of the testimony. *Commonwealth* v. *Scott*, 123 Mass. 222, 228, 236. *Commonwealth* v. *Galvin*, 310 Mass. 733, 746–747. Nor does the fact that the statement was metaphorically phrased affect its admissibility. It follows that there was no abuse of discretion in admitting the testimony, denying the motions to strike and denying the motions for a mistrial.

16. All of the assignments of error have been considered. Those not discussed are without merit. The charge of the judge, to which some of the undiscussed assignments pertain, was clear and complete, and, as to matters assigned as error, essentially correct.

17. The judgments against each defendant on each indictment are affirmed.

So ordered.

Manuel Katz (*Daniel Klubock* with him) for Richard C. Simmers & another.

John D. O'Reilly, Jr. (*Matthew L. McGrath, Jr.*, with him) for Francis W. Kiernan.

Gael Mahony, Special Assistant Attorney General (*William B. Dockser*, Special Assistant Attorney General, with him), for the Commonwealth.

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Supreme Court of the United States.

OCTOBER TERM, 1964.

No. 799.

RICHARD K. GORDON ET AL.,
PETITIONERS,
v.
COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Supreme Court of the United States.

OCTOBER TERM, 1964.

No. 799.

RICHARD K. GORDON ET AL.,
PETITIONERS,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

On May 31, 1962, two indictments were returned by a grand jury sitting in Suffolk County, Massachusetts, which charged petitioners[1] and two other defendants[2] with lar-

[1] Both petitioners are lawyers and members of the Massachusetts bar. Petitioner Gordon is also a District Court judge in Essex County. Gordon has suspended himself from his judicial duties pending the outcome of this case.

[2] The other two defendants were George Lewis Brady and Francis W. Kiernan. Brady has not been tried on the indictments involved in this petition (or on other indictments returned at the same time against Brady and others, on which there have been two convictions and one acquittal), because of the trial court's finding that Brady was incompetent to stand trial. Kiernan was convicted with petitioners in this proceeding but has not joined in this petition for certiorari.

ceny of $450,000 from the Massachusetts Parking Authority and with conspiracy to commit larceny from the Massachusetts Parking Authority.

Verdicts of guilty on both indictments were returned on April 16, 1963. Sentences were imposed on April 22, 1963.[3] On the same day the trial judge ordered that execution of the sentences be stayed, pending appeal of the convictions.

Appeals were taken to the Supreme Judicial Court of Massachusetts under Mass. G.L. c. 278, §§ 33A-33G,[4] to which the case had been ordered made subject by the trial judge (R. 5).[5] On October 5, 1964, the convictions were affirmed by the unanimous decision of the Supreme Judicial Court.

Thereafter the Commonwealth moved in the Superior Court (the trial court) for an order revoking the stays of execution; and petitioners moved in the same court for an order extending the stays of execution, pending petitions for certiorari to this Court. After hearing, the Commonwealth's motion was allowed; the petitioners' motions were

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[3] On the larceny indictment petitioners and Kiernan were sentenced to terms of two and one-half to three years at the Massachusetts Correctional Institution at Walpole, Massachusetts. On the conspiracy indictment they were sentenced to terms of two and one-half years at the Suffolk County House of Correction, to be served from and after the expiration of the sentences on the larceny indictment.

[4] These sections are the so-called "felony appeals" statute, under which the record on appeal includes a transcript of all the testimony at the trial and all the exhibits admitted in evidence.

[5] References to the Summary of Record will be made by the letter "R." followed by the page number. References to the transcript of testimony will be made by the letters "Tr.," followed by the page number. Exhibits will be referred to as "Ex.," followed by the exhibit number. References to the opinion of the Supreme Judicial Court, which is Appendix A to the petition, will be made by the letters "App. A," followed by the page number.

denied; and petitioners were ordered to commence serving their sentences forthwith.

Thereupon, petitioners applied to the Supreme Judicial Court for stays of execution, pending petitions for certiorari to this Court. After hearing, these applications were denied.

Petitioners then applied to this Court for stays of execution. This application was denied by Justice Goldberg on November 16, 1964.

The petition for certiorari was entered in this Court on December 31, 1964.

Statement of Facts.

Introduction.

There was evidence in this case that a conspiracy was formed early in 1959 by George Lewis Brady, chairman of the Massachusetts Parking Authority (Authority), and William F. Thompson, chairman of the board of The Foundation Company (Foundation), who was interested in obtaining for Foundation the contract to construct the garage which the Authority intended to build under the Boston Common. The object of the conspiracy was to steal money from the Authority.

Shortly after the conspiracy was formed, it was joined by Maurice A. Broderick, a New Hampshire lawyer and brother-in-law of Brady, and later by Kiernan and by petitioners Gordon and Simmers.

The crime contemplated by the conspiracy was to be committed in two stages: first, Foundation, which would receive the construction contract for the garage, was to receive a payment for work claimed to have been done by Foundation which in fact had not been done; second, Foundation was to pay the money over to Brady and the other

conspirators under the guise of legitimate payments for (*a*) a finder's fee, (*b*) an attorney's fee and (*c*) a subcontract for various items of work in the construction of the garage. The total kick-back to be made by Foundation came to $405,000.

After the mechanics of the conspiracy had been agreed upon, the Authority and Foundation entered into a contract for the construction of the garage, which provided in part that an initial payment was to be made to Foundation, for services rendered by Foundation before the signing of the contract, in the amount of $450,000 (in fact, the work done by Foundation before the signing of the contract was less than 10% of this amount). The construction contract was signed, among others, by Brady, after it had been approved by Kiernan, who was acting as consulting engineer (referred to as the "construction engineer") for the Authority. The $450,000 was paid to Foundation by the First National Bank of Boston (First National), acting as trustee of the Authority's construction fund, after the construction contract had been signed and after First National had received a requisition for this payment signed by Brady and certified by Kiernan.

After it received the $450,000, Foundation made the payments previously agreed upon to members of the conspiracy. A finder's fee, so-called, of $145,000 was paid to Kiernan (after passing through two straws furnished respectively by Broderick and by petitioner Gordon) and was then paid by Kiernan in whole or in part to Brady. A lawyer's fee, so-called, of $100,000 was paid to petitioners Gordon and Simmers. Neither Gordon nor Simmers performed legal services for Foundation. Similarly, $65,000 was paid by Foundation, under a so-called subcontract, to Granite State Realty and Construction Co., Inc. (Granite State), a New Hampshire corporation organized by Broderick. Granite State did not perform any work under the

so-called subcontract (indeed, Granite State was a paper corporation only, without any employees, equipment or other assets). The money paid ostensibly to Granite State ended up in the hands of petitioners Gordon and Simmers (App. A, 1160-1169).[6]

The first step in diverting the Authority's money to petitioners Gordon and Simmers and to other members of the conspiracy was the payment by the Authority of $450,000 to Foundation. Here is where the impact of the crime was felt. It was represented by members of the conspiracy that this payment was made to compensate Foundation for work done before the signing of the contract. However, there was evidence that this representation was false in two respects: first, the work done by Foundation before the signing of the contract was only a small fraction of this amount; second, the purpose of this payment (at least to the extent of $405,000) was to place money in the hands of Foundation so that Foundation could pay the money over to other members of the conspiracy.

Summary of the Evidence.

In view of the fact that the petition raises questions of the sufficiency of the evidence to support the convictions (on the theory that problems of due process and *ex post facto* laws under the United States Constitution are raised thereby), this brief will refer to the parts of the evidence which the Commonwealth believes are material.

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[6] The total kick-back agreed upon originally came to $405,000, as follows: $150,000 for the finder's fee; $100,000 for the lawyer's fee; $155,000 for the subcontract (App. A, 1162-1163). The amount actually paid was $310,000, as follows: $145,000 for the finder's fee; $100,000 for the lawyer's fee; $65,000 for the subcontract. The finder's fee was discounted $5,000 for early payment (App. A, 1167, n. 15), and $90,000 of the subcontract was never paid (App. A, 1169, n. 16).

Starting in the spring of 1959 a series of conversations began between Brady (who had been appointed recently as chairman of the Authority)[7], officers of Foundation and others, for the purpose of negotiating terms under which Foundation, in return for the award of the construction contract for the garage, would pay a kick-back to Brady and to others (App. A, 1161-1163).[8]

After the terms had been agreed upon, the arrangements for payment of the kick-back were spelled out in three predated letters signed by the president of Foundation on February 20, 1960. The first letter, predated to May 4, 1959, was addressed to a man named Edward Plourde and represented that Foundation would pay Plourde a finder's fee for work obtained in Massachusetts through Plourde's efforts (App. A, 1162; Ex. 16; Tr. 475-476). The amount of the finder's fee for the garage contract, according to the formula contained in this letter, was $150,000. However, Plourde had done nothing to bring the Parking Authority and Foundation together.[9] In fact, he was acting as a straw for Brady (App. A, 1162; Tr. 470-472; Tr. 686-694; Tr. 1007-1022). The second letter, predated to June 17, 1959, was addressed to Broderick and provided that Foundation would pay him $100,000 for legal services rendered for the garage job and other projects (App. A, 1162; Ex. 17; Tr. 476-477). In fact, no legal services were to be rendered by Broderick. The third letter, predated to February 11, 1960, was addressed to Granite State and recited that

[7] The Authority was created in 1958 by the Massachusetts legislature. Its purpose was to build, operate and maintain a garage under Boston Common (App. A, 1160-1161, 1173-1175). See Mass. Acts of 1958, c. 606; Ex. 6; Tr. 324-329.

[8] Tr. 915-925; Tr. 1040-1049; Tr. 1086-1104; Tr. 464-475; Tr. 653-658; Tr. 692-694; Exs. 15-17; Tr. 475-478.

[9] Plourde had been enlisted by Broderick.

Granite State would receive a subcontract from Foundation for four work items in the construction of the garage, totalling $155,000 (Ex. 15; Tr. 477-478). In fact, Granite State had no assets and was incapable of performing any work (App. A, 1163).[10]

On February 23, 1960, three days after the signing of the predated letters, the Authority held a meeting at its office in Boston, at which a series of resolutions were adopted. One resolution provided for the appointment by the Authority of Muzzillo and Tizian (represented by defendant Kiernan throughout the construction of the garage) as "construction engineer" to represent the Authority in accordance with the terms of the so-called "Bond Resolution" (Ex. 6; Tr. 324-331), which was adopted at the same meeting. In general, it was the duty of the construction engineer (Kiernan) to "approve the design, plans and specifications of the Project [Boston Common Garage] prior to construction of the Project and, on behalf of the Authority [to] supervise the construction of the Project and report weekly to the Authority on the compliance of such construction with the design, plans and specifications for the Project" (Ex. 6, § 709; Tr. 324-331). The Bond Resolution further provided that no obligation incurred for work done in the construction of the garage could be paid without a certificate, signed by the construction engineer, certifying that "such work was actually performed" (Ex. 6, § 406[c]; Tr. 324-331).

Another resolution, adopted at the same meeting, approved the form and substance of a contract between the Authority and Foundation. This contract provided that 6 per cent ($450,000) of the total contract price of $7,500,000 was to be paid to Foundation at the signing of the contract "*as payment for architectural and engineering services*

[10] Tr. 463-464, 478-479, 531-534.

heretofore rendered by the contractor in connection with the project" (App. A, 1163-1164; Ex. 7; Tr. 332-335). (Emphasis added.) In fact, at the time the contract was signed by the Authority and Foundation (March 2, 1960), the work done by Foundation came only to $35,246.44, less than 10 per cent of the initial payment[11] (App. A, 1165; Tr. 1359-1394; Exs. 71, 71-A; Tr. 1373-1379, 1393-1394, 1415-1416).

The various resolutions[12] adopted at the meeting of the Authority on February 23, 1960, were all signed by Brady. In addition, the proposed contract with Foundation, approval of which was voted at this meeting, had been approved previously by Kiernan in writing (App. A, 1163; Ex. 7; Tr. 332-335).

Once the various resolutions had been approved by the Authority, arrangements could be made to consummate the sale of the Authority's bonds, to sign the construction contract and to make the payment of $450,000 to Foundation which the construction contract called for. Accordingly, it was agreed that the closing, so-called, would be held on March 2, 1960, at the Chemical Bank, New York Trust Company (Chemical Bank), in New York City. Present at the closing were Brady, other members of the Authority, Kiernan, representatives of Foundation, representatives of the underwriter John Nuveen & Co. (Nuveen)

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[11] The difference between the initial payment to Foundation of $450,000 and the cost to Foundation of $35,246.44 at the time the contract was signed is $414,753.56, slightly in excess of the $405,000 which Foundation had agreed to pay as a kick-back.

[12] Other resolutions were adopted at this meeting, including a resolution approving a so-called "Purchase Contract" under which John Nuveen & Co. was to act as the underwriter for the sale of the Authority's bonds (Tr. 368-371; Tr. 1486-1498; Exs. 10, 11; Tr. 362-371) and a resolution appointing First National as construction-fund trustee (Ex. 9; Tr. 343-344).

and representatives of various banks including First National (which was to act as trustee of the Authority's construction fund). At this meeting the construction contract was signed by Brady, Kiernan and others. It provided (as did the contract previously approved in Boston by Brady and Kiernan) that "Six per cent [*i.e.*, $450,000] of the total of the above amount [*i.e.*, the $7,500,000 contract price] shall be paid to the contractor on the effective date of this contract *as payment for architectural and engineering services heretofore rendered by the Contractor in connection with the project.*"[13] (Emphasis added.) After the construction contract had been signed, Brady delivered the Authority's bonds to Nuveen and received in return two checks, one of which (for $7,732,800) was endorsed over to First National and then deposited in Chemical Bank, to the account of First National as trustee of the Authority's construction fund. Thereupon requisition 1 to First National was signed by Brady on behalf of the Authority. It contained two payment items, one of which was for $450,000 to Foundation in "*Payment for architectural and engineering services as required by Construction Contract.*" (Emphasis added.) Attached to this requisition was a certificate signed by Kiernan (acting as construction engineer for the Authority) which recited that the work referred to in the requisition had been "*actually performed.*" (Emphasis added.) As a consequence of this requisition and the attached certificate,[14] First National paid over $450,000 to Foundation (App. A, 1165-1166).

As soon as the $450,000 had been paid to Foundation (by reason of the various misrepresentations concerning the

[13] As pointed out previously, the work actually done by Foundation at the time the contract was signed came to $35,246.44.

[14] Tr. 1163-1167, 1275, 1327-1331; Ex. 6 (§ 406[c]); Tr. 324-331.

purpose of the payment), the second stage of the plan could be put into operation: *i.e.*, the kick-back payments by Foundation to Brady and others, in the guise of a finder's fee, a lawyer's fee and a subcontract.

Accordingly, the finder's fee was paid by Foundation to Plourde, who was acting as a straw for Brady (App. A, 1162). On the day of the closing, after Foundation had received and deposited the check for $450,000,[15] Foundation gave Plourde a check for $100,000. The following day, March 3, Plourde deposited this check in an account in his name at the Manufacturers Trust Company (Manufacturers Trust) in New York City (App. A, 1166).

On March 24, 1960, Plourde received a second check from Foundation, this time for $45,000,[16] which he also deposited in his account at Manufacturers Trust (App. A, 1167).[17] On the same day he had a meeting in a New York hotel with Brady, Broderick and Kiernan, at which there was an argument about how the money was to come out of Plourde's account. Broderick testified as follows: "Mr. Brady wanted Plourde to give him the money, the finder's money in cash, and we refused, and I told Brady that I would not permit Plourde to do it. Brady then suggested or Brady then said that the money should be turned over by Plourde to [petitioner] Richard C. Simmers"[18] (Tr. 501).

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[15] The $450,000 was deposited by Foundation during banking hours on March 2, 1960 (Ex. 80; Tr. 1406-1408). Plourde was not given the $100,000 check until the late afternoon or evening of March 2, after banking hours (Tr. 480-483, 703).

[16] The total of the finder's fee was reduced from $150,000 to $145,000 because of early payment of the second installment (App. A, 1167, n. 15).

[17] Ex. 26; Tr. 492-507; Tr. 721-743.

[18] The following appears as footnote 14 in the opinion of the Supreme Judicial Court (App. A, 1167):

"The rather abrupt appearance on the scene of Simmers, and shortly thereafter of Gordon and one Craven, as replacements for

During the course of this meeting Brady signed a paper which said: "Maurice [*i.e.*, Broderick] pay proceeds of the check to [petitioner] Richard C. Simmers" (Ex. 19; Tr. 504-507). In response to this instruction, Plourde drew two checks payable to Simmers, totalling $140,000. These checks were destroyed by Kiernan at a later meeting in New York, on April 1, 1960, when the finder's fee was finally removed from Plourde's account (Tr. 728-743).

On April 1, 1960, petitioners Gordon and Simmers, who were law partners (App. A, 1167; Tr. 893, 895), and John J. Craven arrived in New York City and met Brady, Kiernan and Plourde. Craven, who, like Plourde, was to serve as a straw in transferring the finder's fee, had been enlisted by Gordon (Tr. 892-894). Thereupon both groups, with the exception of Brady, proceeded to Manufacturers Trust, where Plourde had deposited the finder's fee. On the way, Simmers purchased a briefcase in which $140,000 in cash was later carried from the bank (Tr. 894-895). When they arrived at Manufacturers Trust, Plourde drew a check to Craven for $140,000,[19] which was then cashed. When the bank produced the money (consisting of a hundred $1,000 bills and eighty $500 bills), Gordon, Simmers and the others retired to a small anteroom, where the money was counted (Tr. 756-759, 898-900). When the counting was complete, Simmers reached over and put the money in the briefcase which he had bought just before entering the

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Broderick and Plourde, is in part probably accounted for by a dispute between Broderick and Brady about Plourde. Brady wanted the 'finder's fee' to come to him from Plourde in cash, but Broderick did not wish to have Plourde left, as a result, with an income tax problem. Broderick also told Brady that the compensation which Brady proposed to give to Plourde for acting as a straw was too small."

[19] The difference of $5,000 between the $145,000 paid as a finder's fee and the $140,000 check drawn to Craven represents Plourde's fee for serving as a straw (App. A, 1167).

bank (Tr. 900). Kiernan, accompanied by Plourde, then carried the briefcase uptown, where they met Brady; and Kiernan and Brady counted the money again. When this counting was complete, the empty briefcase was given to Plourde. Later that day, Gordon gave Craven one of the $500 bills as payment for his assistance. In this manner the finder's fee paid to Plourde by Foundation was removed from Plourde's account and paid either to Brady or partly to Brady and partly to other members of the conspiracy (App. A, 1167-1168).

The second means for accomplishing the kick-back payments was the so-called attorney's fee. In April of 1960, in accordance with the predated attorney's fee letter (signed at The Foundation office on February 20, 1960), a check for $50,000, in payment of the first installment of the attorney's fee, was sent to Broderick. However, by this time there had been a change of plan: Gordon, and not Broderick, was to be the recipient of the attorney's fee. As a result, Broderick returned the check for $50,000 to Foundation with a letter in which he assigned his interest in the fee agreement to Gordon (Ex. 21; Tr. 518-523, 966). Subsequently Gordon received three checks from Foundation, totalling $100,000, in full payment of the attorney's fee (Exs. 42-44; Tr. 957-959). These checks were cashed or put through for collection. Part of the proceeds went to Gordon, and part (including five $10,000 bills) went to Simmers (Tr. 1537-1551). Neither Gordon nor Simmers performed legal services for Foundation[20] (App. A, 1168).

[20] Each of the following witnesses (everyone who would have occasion to know) testified that to his knowledge neither Gordon nor Simmers performed legal services for Foundation: Shea, attorney for Foundation (Tr. 1113-1114); Gallagher, attorney for Foundation (Tr. 1137); Thompson, chairman of the board of Foundation (Tr. 1023-1028); Ferrick, attorney for the Authority (Tr. 1559-1561).

The last device for making the kick-back payments was the so-called subcontract. On June 8, 1960, Foundation sent a check for $40,000 to Granite State, pursuant to a fictitious purchase order, ostensibly for the construction of four construction buildings at the garage site (Ex. 45; Tr. 959-960). On March 3, 1961, Foundation sent another check to Granite State, this time for $25,000, ostensibly for the construction of fences (Ex. 78; Tr. 1401-1402; Ex. 46, Tr 959-960). No work was done by Granite State in return for these payments (Tr. 1452-1454). In fact, Granite State was only a paper corporation, with no tangible assets (Tr. 463-464, 478-479, 531-534). The $65,000 paid to Granite State went to Gordon and Simmers (Tr. 1504-1531). Fictitious bills of Granite State in support of these payments were sent by Gordon and Simmers to Foundation (Ex. 76; Tr. 1395-1399; Ex. 78; Tr. 1401-1402). See App. A, 1168-1169.

By these means the kick-back payments were made by Foundation, in accordance with the understanding when the conspiracy was formed.

Summary of Argument.

A. There is no merit in petitioners' contention that the grand jury was not impartial. There is no evidence of bias on the part of any grand juror against either petitioner or any other defendant, and there was nothing inflammatory or unfair in the newspaper stories referred to in the Summary of Record. The impartiality of the grand jurors is assured by the oath which they take and by their random selection to hear a wide variety of cases (all felony prosecutions in Massachusetts must be initiated by grand-jury indictment).

B. There is no merit in petitioners' contention concerning possible bias on the part of the trial jury, since the trial

judge took full precautions to insure that the jurors chosen would be indifferent. No question under the United States Constitution is raised by Mass. G.L. (Ter. Ed.) c. 234, § 28, which permits the trial court, in its discretion, to conduct the voir dire examination of prospective jurors itself, or to delegate the examination to counsel.

C. There was abundant ground for founding territorial jurisdiction in the Commonwealth of Massachusetts and venue in Suffolk County. The initial false pretenses, which culminated in the payment of Authority money to Foundation, took place in Boston. The Authority, First National (trustee of the construction fund) and the garage itself are located in Boston. Although the $450,000 was transferred from the Authority to Foundation in New York City, part of the proceeds of the larceny was later brought into Massachusetts and deposited in banks in Lawrence and Andover.

D. No question is raised under the United States Constitution by the action of the Supreme Judicial Court in overruling a previous decision which had clearly misconstrued the plain meaning of a venue statute for false pretenses. Even if the action of the court amounted to a change in the rule of venue, instead of the correction of an erroneous construction adopted previously, no question of an *ex post facto* law would be presented; nor would this result so violate the fundamental principles of legal proceedings as to constitute a denial of due process. In any event, petitioners waived this question by failing to argue it before the Supreme Judicial Court.

E. In section V of petitioners' Reasons for Granting the Writ it is contended that the evidence was insufficient to establish various elements of the crimes of which petitioners were convicted (on the theory that questions of due process and *ex post facto* laws are raised thereby). However, the evidence was sufficient to support the convic-

tions on each indictment. Even if we assume petitioners' contention *arguendo*, the matters raised would be questions of state law only and would not present questions under the United States Constitution.

F. The petition requests that certiorari issue to the wrong court. In felony prosecutions in Massachusetts, judgment is entered in the Superior Court. The taking of an appeal does not transfer the case to the Supreme Judicial Court, but only the questions of law which are raised. The rescript from the Supreme Judicial Court does not represent a judgment, but only a direction as to the judgment to be entered in the Superior Court.

Argument.

A. There is No Evidence of Bias on the Part of the Grand Jury.

Section I of petitioners' Reasons for Granting the Writ has to do with the news reporting concerning this case and its possible effect on the deliberations of the grand jury. In their argument petitioners assume that the news reports caused the grand jurors to be prejudiced, and they say that a question of due process thereby is raised.

However, the only reference to the allegedly prejudicial publicity in this section of the petition appears at the top of page 28, as follows: "In the instant case, the headlines printed in the Summary of the Record (R. 40-44, 80-90, 159-162)[21] show that the publicity emanated from the office of the Attorney General." In the first place, an examination of the pages referred to in the Summary of Record demonstrates that the words just quoted are not a correct state-

[21] The three different sections of the Summary of Record referred to consist principally of duplications of the same newspaper leads.

ment of fact; there is little if anything in these pages to show that publicity "emanated from the office of the Attorney General."[22] Moreover, there is no mention of either petitioner by name in these newspaper leads, prior to the return of the indictments. Nor is there any statement or inference in these newspaper leads, prior to the return of the indictments, that either petitioner was guilty of a crime. Therefore there is no support in the record for the contention that pre-indictment publicity was prejudicial to petitioners.

In *Beck* v. *Washington,* 369 U.S. 541, certiorari was granted on the question, among others, of whether there

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[22] The newspaper leads which would appear to have come from the office of the Attorney General are the following:

(*a*) "Garage Board warned of grand jury action," "McCormack (then Attorney General) demands files," Boston Herald, March 26, 1962 (R. 42, 82, 161). This statement appeared at the beginning of the investigation, more than a month before the grand jury was convened (May 3, 1960) (R. 86) and more than two months before the return of the indictments (May 31, 1960) (R. 90, 162). There is nothing in this statement prejudicial to either of the petitioners or to anyone else. Certainly it was proper for the Attorney General to call upon the Authority to produce its records for examination by his staff before the matter was presented to the grand jury.

(*b*) "McCormack says thousands paid, no questions asked, garage deals 'fantastic'," Boston Herald, March 30, 1962 (R. 43, 82, 161). This statement also was made at the beginning of the investigation, more than a month before the grand jury was convened and more than two months before the return of the indictments. The statement does not refer to the petitioners or to anyone else by name, and it does not accuse anyone of a crime.

(*c*) "Furcolo (former governor of Massachusetts) given clean bill by McCormack," Boston Herald, April 10, 1962 (R. 43, 84, 162). Obviously this statement was not prejudicial to petitioners.

(*d*) "Brady apologizes for statements McCormack tells ex-garage head he could be defendant," Boston Globe, May 14, 1962 (R. 88). This statement by McCormack (not prejudicial to petitioners) was in reply to inflammatory statements by Brady (R. 88): "Brady faces contempt action for blast at grand jury"; "Brady apologizes for calling garage probe 'white wash'."

was a requirement under the United States Constitution that state grand juries be impartial (365 U.S. 866). On consideration of the case it was decided that there was no showing of prejudice (therefore, the Court did not reach the question on which certiorari was granted).

If the newspaper and other publicity in *Beck* v. *Washington* did not support a claim of prejudice, no such claim can be made in the present case. In the *Beck* case the defendant had been summoned before the Select Committee on Improper Activities in the Labor or Management Field of the United States Senate and had been questioned, among other things, about his dealings with union funds. On some 210 occasions, in reply to questions from the committee, Beck invoked his privilege against self-incrimination. These hearings, and Beck's refusal to testify, were widely publicized, especially in Kings County in Washington, where the grand jury that indicted Beck was convened. Less than three weeks before this grand jury was convened, Beck was indicted by a federal grand jury for tax fraud; and this fact also was widely publicized. Furthermore, the chairman of the Senate committee made this statement, while the state grand jury was deliberating: "The Committee has not convicted Mr. Beck of any crime, although it is my belief that he has committed many criminal offenses."

It was further contended in the *Beck* case that the state court had not taken sufficient precautions to insure that the grand jury would be impartial.[23] However, after re-

[23] In Washington prosecution by grand jury indictment is no longer mandatory, although it may be restorted to at the discretion of the prosecution (generally when the subpoena power is required for the investigation). Therefore, in Washington grand jurors are convened to hear a particular case and may be instructed beforehand with respect to that case. In Massachusetts, however, all felony prosecutions must be initiated by grand jury indictment (article 12 of the Declaration of Rights of the Massachusetts Con-

viewing the procedure for selecting the grand jury, this Court concluded that there had been no showing of bias.

In the present case we submit, first, that the pre-indictment publicity (certainly less damaging than in the *Beck* case) cannot be considered prejudicial; second, we say that the procedure for selecting the grand jury (as this Court found to be true in the *Beck* case) insured that the grand jury would be free from bias. Each grand juror in the present case took the following oath, as required by Mass. G.L. (Ter. Ed.) c. 277, § 5:

> "You, as grand jurors of this inquest for the body of this county of (Suffolk), do solemnly swear that you will diligently inquire, and true presentment make, of all such matters and things as shall be given you in charge; the commonwealth's counsel, your fellows' and your own, you shall keep secret; you shall present no man for envy, hatred or malice, neither shall you leave any man unpresented for love, fear, favor, affection or hope of reward; but you shall present things truly, as they come to your knowledge, according to the best of your understanding; so help you God."

Moreover, because this grand jury was selected at random for general grand jury service, and without forewarning that they would hear this case, it is unlikely that they had formed preconceived notions as to the guilt or innocence of petitioners, or of anyone else who was later named in the indictments. On the other hand, there is a danger in the particularity of the instructions given to the grand

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stitution). Therefore in Massachusetts grand juries are convened from time to time in the various counties, to hear whatever cases may be presented while they are sitting. Since the court does not know in advance what cases will be presented, Massachusetts grand juries are given general instructions and are not instructed about particular cases.

jurors in the *Beck* case, as this Court recognized. In reply to the defense argument that the Washington court failed to instruct the grand jurors about the Fifth Amendment, or to admonish them to disregard news reports, this Court said (369 U.S. 541, 548):

> "Discussion along such lines might well have added fuel to the flames which some see here."

It should be borne in mind that there is no evidence or allegation of prejudice on the part of any particular member of the grand jury. As this Court said in *Darcy* v. *Handy*, 351 U.S. 454, 462:

> ". . . it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality."

B. Conduct of the Voir-Dire Examination of Trial Jurors by the Judge does Not Raise a Constitutional Question.

The next matter raised by petitioners has to do with the voir dire questioning of prospective trial jurors. Mass. G.L. (Ter. Ed.) c. 234, § 28, provides in part as follows:

> ". . . the court shall, or the parties or their attorneys may under the direction of the court, examine on oath a person who is called as a juror therein, to learn whether he is related to either party or has any interest in the case, or has expressed or formed an opinion, or is sensible of any bias or prejudice, therein . . ."

In this case the trial judge asked all prospective jurors the questions required by the cited statute and other questions that were suggested by the responses which he received. As the Supreme Judicial Court said (App. A, 1159): "The judge . . . interviewed each juror separately in open court, informed each of the essentials of the indictments, inquired of each as to the matters embraced in G.L. c. 234, § 28, so far as relevant, and in addition propounded, as the particular situation commended, additional inquiries, including some suggested by counsel. In all respects the judge was meticulous to insure the empanelling of a jury free from bias." Each person selected for the jury had stated, in reply to questions put by the trial judge, that he or she had no preconceived opinion as to the innocence or guilt of the petitioners. Anyone expressing bias or preconceived notions of guilt or innocence was excused by the trial judge.

The petitioners' position as to this matter, apparently, is that conduct of the voir dire examination of prospective jurors by the trial judge, instead of permitting this examination to be conducted by defense counsel, is a denial of due process. This position, we submit, is without merit. The procedure adopted by the trial judge has long been permissible in Massachusetts (App. A, 1159). When a trial judge questions the jurors conscientiously to make sure that they are free from bias, as the trial judge did in this case, it cannot be said that his refusal to permit the examination to be conducted by counsel so violates the fundamental principles of legal proceedings as to constitute a denial of due process. *Buchalter* v. *New York,* 319 U.S. 427.[24]

[24] Nine other states and the Federal Rules of Criminal Procedure (Rule 24[a]) have provisions similar to that of Massachusetts concerning the voir dire examination of jurors (Appendix D to the Petition, pp. 69-73).

The same question was raised in *Commonwealth* v. *Geagan*, 339 Mass. 487, 159 N.E. 2d 870 (1959); cert. den. 361 U.S. 895, 80 S.C. 200, 4 L. Ed. 2d 152 (1960). After the petition for certiorari had been denied by this Court, following the state court proceedings, the defendant in *Commonwealth* v. *Geagan* raised the same question again, among others, in a habeas corpus proceeding in the Federal District Court. *Geagan* v. *Gavin*, 181 F. Supp. 466 (1960). In denying the petition for habeas corpus, Wyzanski, J., said, concerning the voir dire examination of the prospective jurors (which was substantially the same as that in the instant case), at page 474:

> "Nor does this Court regard the actual questions put by Judge Forte as inadequate. They covered not only the grounds specified by Mass. G.L. (Ter. Ed.) c. 234 § 23, but also other points. They were calculated to discover whether a juror was free from prejudice caused by pre-trial publicity. These questions satisfied the Massachusetts Supreme Judicial Court and they satisfy the demands of the due process clause."

The decision of the District Court was affirmed on appeal, *Geagan* v. *Gavin*, 292 F. 2d 244 (1961); and certiorari was denied again, 370 U.S. 903, 82 S.C. 1247, 8 L. Ed. 2d 399 (1962).

Accordingly, we submit that the question raised in this case concerning the voir dire examination of the trial jurors is not sufficient to support the petition for certiorari.[25]

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[25] The question concerning Massachusetts practice in the voir dire examination of prospective jurors was raised as issue No. 4 in the first petition for certiorari (No. 421, October Term, 1959; *Geagan* v. *Massachusetts*, 361 U.S. 895) and as issue No. 3 in the second petition for certiorari (No. 394, October Term, 1961, 370 U.S. 903).

C. There was Abundant Ground for Founding Territorial Jurisdiction in Massachusetts and Venue in Suffolk County.

The larceny indictment (R. 1-2) is in the general language provided by statute (G.L. [Ter. Ed.] c. 277, § 79), which permits proof of larceny in any form (G.L. [Ter. Ed.] c. 277, §§ 39, 41). Under this indictment it was proper to prove a violation of G.L. c. 266, § 33(1).[26] *Commonwealth* v. *Kelley,* 184 Mass. 320, 322-324. *Commonwealth* v. *King,* 202 Mass. 379, 386-391. *Commonwealth* v. *Green,* 302 Mass. 547, 553-554. In fact, an offense under this section was charged specifically by the substitute bills of particulars (R. 74-76), which allege that the defendants "with intent to defraud obtained by false pretenses the *making* of a check . . ." (Emphasis added.) *Commonwealth* v. *Iannello,* 344 Mass. 723, 726-727. Accordingly, the offense defined in G.L. c. 266, § 33 (1), was part of the larceny case. Therefore, with respect to the questions of venue and jurisdiction for the larceny indictment, reference may be made to venue and jurisdiction for the offense defined in this section.

Since there is no statutory venue for G.L. c. 266, § 33 (1), the common-law rule applies, which is that venue will lie in the county where the offense was committed. *Commonwealth* v. *Parker,* 2 Pick. 550, 554. *Commonwealth* v. *Quin,* 5 Gray 478, 480. *Crocker* v. *Justices of the Superior Court,* 208 Mass. 162. The crime is committed when someone "with intent to defraud, *obtains by a false pretence the*

[26] In pertinent part, this statute provides as follows: "Whoever, with intent to defraud, obtains by a false pretence the making . . . of a bill of exchange . . . shall be guilty of larceny." It is noteworthy that this offense does not require a showing that the bill of exchange changed hands; the crime has been committed when the bill of exchange is *made.*

making . . . of a bill of exchange . . ." (Emphasis added.) If the bill of exchange is a check, the crime has been committed when the check has been made out and signed, *which in this case was at the main office of First National in Boston* (Tr. 670-671, 1214-1215). Furthermore, Authority resolutions approving various documents (*e.g.*, the proposed construction contract between the Authority and Foundation), which the jury could have found were misrepresentations and without which the jury could have found that the check could not have been made, were adopted at an Authority meeting in Boston. Every element of the offense defined in G.L. c. 266, § 33 (1), occurred in Boston. Therefore venue properly was laid in Suffolk County. Obviously, there is no problem in founding jurisdiction in Massachusetts for this offense.[27]

Therefore the argument made by petitioners (section III of Reasons for Granting the Writ) that there was no evidence of a larceny committed in Massachusetts (or for which venue properly would lie in Suffolk County) is without merit.

Petitioners argue that the larceny terminated when the $450,000 was paid to Foundation in New York and when this money was mingled with the general funds of Foundation. They are forced to take that position for this reason: The later payments made by Foundation to Gordon and Simmers (the attorney's fee and the subcontract payments)

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[27] Under the indictment and substitute bills of particulars the Commonwealth also could prove an offense under G.L. c. 266, § 30, which provides in pertinent part that "Whoever . . . with intent to defraud obtains by a false pretence . . . the property of another . . . shall be guilty of larceny . . ." In this case venue of the crime defined in this section was properly laid in Suffolk County (and jurisdiction in Massachusetts). Our argument in support of this position appears in part D of the Argument *infra*, in reply to section IV of Reasons for Granting the Writ contained in the petition.

were deposited by them in Massachusetts banks (Tr. 1495-1531; Tr. 1537-1551). The venue section for false pretenses which petitioners admit applies (G.L. [Ter. Ed.] c. 277, § 58)[28] provides for venue wherever the defendant "had possession of the property alleged to have been stolen." Therefore, unless petitioners contend that the money which they received from Foundation and deposited in Massachusetts banks was not "property alleged to have been stolen," they must concede that Massachusetts had jurisdiction of the larceny charged. However, in arguing that the crime terminated when the money was paid to Foundation, petitioners overlook the long-standing Massachusetts rule that larceny is a continuing offense until the asportation is complete. *Commonwealth* v. *Rand*, 7 Met. 475, 477. *Commonwealth* v. *Parker*, 165 Mass. 526, 538-539. Furthermore, the Supreme Judicial Court has found that (App. A, 1173):

> "It is clear that the criminal design, from its inception, contemplated that the funds, through Foundation, should reach Brady's hands or the hands of persons designated by him, and that only when that result had been achieved would the enterprise, i.e., the larceny, be complete. And, indeed, it was only when that result was achieved that the essential larcenous nature, i.e., the animus furandi, of the plan became clear and demonstrable. Simmers and Gordon knowingly coöperated to advance the plan through that decisive stage. They accomplished with animus furandi the asportation of the funds both in New York and in Massachusetts."

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[28] Petitioners argue that G.L. (Ter. Ed.) c. 277, § 58, is the only venue section for false pretenses. However, the Supreme Judicial Court held in this case (App. A, 1175-1177) that G.L. (Ter. Ed.) c. 277, § 59 also applies.

In any event, even if we assume petitioners' contention *arguendo* that the Massachusetts court misapplied state law in founding venue for the larceny indictment in Suffolk County, no question arises under the United States Constitution. There are sufficient connections between what took place in this case and the state of Massachusetts[29] to make a finding of jurisdiction in Massachusetts consistent with the fundamental principles of legal proceedings and therefore in accord with due process. *Buchalter* v. *New York*, 319 U.S. 427. Although a change in the established rule as to Massachusetts *jurisdiction* of the larceny charge might raise an *ex post facto* question[30] (*Bouie* v. *City of Columbia*, 378 U.S. 347, 84 S.C. 1697; *Beazell* v. *Ohio*, 269 U.S. 167, 46 S.C. 68), a change in the rule as to the county in Massachusetts in which *venue* of this crime may be laid would not. *Cook* v. *United States*, 138 U.S. 157, 183, 11 S.C. 268, 275. *Gut* v. *State of Minnesota*, 9 Wall. 35, 37.

D. No Constitutional Question is Raised by the Action of the Supreme Judicial Court in Overruling a Prior Decision which had Clearly Misapplied a State Statute Concerning Venue.

In part IV of the petition questions are raised under the United States Constitution concerning the holding by the Supreme Judicial Court that the venue provision of

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[29] The Authority, First National (construction fund trustee) and the garage are located in Boston. False pretenses were made in Boston. The $450,000 check to Foundation was made and signed in Boston. Proceeds of the larceny were deposited in banks in Andover and Lawrence, both in Massachusetts.

[30] As pointed out previously, no substantial question can be raised as to jurisdiction in Massachusetts of the larceny charge.

G.L. (Ter. Ed.) c. 277, § 59,[31] applies to this case.[32] This argument is based on the fact that in 1905 the Supreme Judicial Court held (*Commonwealth* v. *Friedman,* 188 Mass. 308) that the predecessor of this statute did not apply to the predecessor of what is now Massachusetts General Law, c. 266, one of the larceny statutes under which the petitioners in this case were charged.[33] In deciding the present case, the Supreme Judicial Court, after careful consideration, reversed the holding in *Friedman* and ruled that the venue statute in question does apply to G.L. c. 266, § 30 (App. A, 1175-1177). The petitioners now assert that the overruling of *Friedman* raises due process and *ex post facto* questions.

In reply to this argument, it should be noted that the first time this argument has been made is in the petition to this Court. In its brief (and in oral argument) the Commonwealth had argued that *Friedman* should be overruled (App. A, 1176). Under the Massachusetts practice (Rule 16 of the Rules for the Regulation of Practice before the Full Court of the Supreme Judicial Court),[34] petitioners had the right to file a reply brief to answer this argument. No reply brief was filed, and nothing was said in the oral

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[31] This statute provides as follows:

"The crime of obtaining money or a personal chattel by a false pretence . . . may be alleged to have been committed, and may be prosecuted and punished, in any county where the false pretence was made, written or used, or in or through which any of the property obtained was carried, sent, transported or received by the defendant."

[32] App. A, 1175-1177.

[33] Petitioners were also charged with the forms of larceny defined in G.L. c. 266, §§ 33(1) and 34. *Commonwealth* v. *King,* 202 Mass. 379, 386-391. *Commonwealth* v. *Kelley,* 184 Mass. 320, 322-324. *Commonwealth* v. *Iannello,* 344 Mass. 723, 726-727 (R. 74-76).

[34] See Appendix I attached to this brief.

arguments about constitutional questions that might be raised by the overruling of *Friedman*.[35] Under Massachusetts practice the failure to brief and argue the questions constituted a waiver (Rule 13 of the Rules for the Regulation of Practice before the Full Court of the Supreme Judicial Court).[36]

The reason for this rule is well illustrated by what happened in this case. The Commonwealth made three arguments before the Supreme Judicial Court in support of a finding that venue had been established in this case.[37] The first and third arguments had nothing to do with the ruling in the *Friedman* case. Only the second argument concerned the holding in *Friedman*. In its opinion the Supreme Judicial Court dealt only with the venue question concerning the *Friedman* case, and made no reference, one way or the other, to the other arguments made by the Commonwealth in support of venue. Indeed, since the Court was persuaded that *Friedman* should be overruled, and since no contrary argument had been made by petitioners either by reply brief or by oral argument, there was no reason for the Court to concern itself with the other arguments about venue. If the question which the petitioners now raise (about the overruling of *Friedman*) had been argued to the Supreme Judicial Court, that Court would have had the opportunity to deal with the other venue arguments made by the Commonwealth, to determine whether venue had been established regardless of whether *Friedman* was overruled. Therefore we suggest that in this case there is special force to the rule that failure to make an argument at the appropriate time constitutes a waiver.

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[35] See pages 37-38 of the petition.

[36] See Appendix I attached to this brief.

[37] Reference to these arguments appears at page 37 of the petition, n. 16.

Moreover, the petitioners' argument concerning the overruling of *Friedman* is without merit. The principal case cited by them in support of their argument is *Bouie* v. *City of Columbia*,[38] 378 U.S. 347, 84 S.C. 1697. In the *Bouie* case there was a statute which made it a crime *to enter* upon premises *after being notified of a prohibition against such entry.* The state court held that this statute would support a conviction of defendants *who were invited to enter* upon certain premises but then *refused to leave,* after being directed to do so. Clearly, this was such a strained construction of a criminal statute as to amount to *ex post facto* law-making by the court. In the present case the situation is entirely different. Here we have a venue statute which, on its face, clearly applies to the larceny statute. As the Supreme Judicial Court said: "If this were a case of first impression we should have no hesitation in reaching the conclusion that by the plain terms of G. L. c. 277, § 59, the Commonwealth's contention is correct" (App. A, 1175). In overruling the *Friedman* case the Supreme Judicial Court was not attempting to make law, but was merely correcting an earlier decision which had misconstrued the plain meaning of a statute and had overlooked a lengthy and uniform legislative history (App. A, 1176-1177).

Moreover, a change in the law of a state concerning the county in which venue may be laid (assuming the state had

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[38] This Court has held that the *ex post facto* clause of the United States Constitution is directed against legislative action and does not reach erroneous or inconsistent decisions by a state court. *Frank* v. *Mangum,* 237 U.S. 309, 35 S.C. 582. *Ross* v. *Oregon,* 227 U.S. 150, 33 S.C. 220. This rule appears to have been modified by the recent decision in *Bouie* v. *City of Columbia, supra.* However, *Bouie* applies to "*unforeseeable*" judicial action. In view of the clear meaning of the venue statute concerned in this case, the decision by the Supreme Judicial Court in this case was not "unforeseeable."

jurisdiction over the crime when it was committed) does not present a question under the United States Constitution.[39]

E. The Evidence was Sufficient to Support the Convictions.

In section V of the petition it is argued that the evidence was insufficient, in several respects, to support the convictions. The short answer to this argument is that it concerns alleged errors in the application of state law which do not present questions under the United States Constitution. *Buchalter* v. *New York*, 319 U.S. 427.

Furthermore, in each respect referred to by petitioners the evidence was clearly sufficient to support the convictions.

As to the criminal intent of Simmers and Gordon, there was evidence that they received $165,000 from Foundation ($100,000 for the legal fee and $65,000 for the subcontract) for which they knew that no services had been rendered. They produced Craven to act as a straw in transferring the finder's fee; they were present when the finder's fee, in cash, was counted at the bank; Simmers purchased the briefcase in which the cash was carried from the bank. In addition to receiving the payments under the so-called attorney's fee and subcontract, they sent false statements and bills to Foundation to support these payments. Clearly they were acting, with guilty knowledge, in concert with the other conspirators. Nor can they escape liability for the larceny merely because they were not participants in one part (false pretenses) of a crime that was committed in several stages. The law in Massachusetts is that the crime of larceny is a continuing offense until the asportation is

[39] See section C of this argument, *supra*, pp. 22-25.

complete and that knowing participants in one or more aspects of the commission of the crime are guilty of the entire crime (App. A, 1172-1173).

As to the element of reliance on the false pretenses, the evidence was that under the Bond Resolution (Ex. 6; Tr. 324-331) the construction fund trustee was obligated to make payments upon receipt of a requisition from the Authority certified by the construction engineer. Accordingly, requisition 1 (calling for the payment to Foundation of $450,000), which had been signed by defendant Brady and certified by defendant Kiernan, caused the payment to be made. It is of no consequence that one or more members of the Authority may have been parties to the conspiracy, since the knowledge of a fraudulent agent is not imputed to his principal. *Commonwealth* v. *Mulrey*, 170 Mass. 103, 106. See App. A, 1171-1172.

Finally, petitioners contend that the indictments were defective in naming the Authority instead of First National as to the victim of the crimes. This argument is entirely without merit (App. A, 1173-1175).

F. The Petition Requests that Certiorari Issue to the Wrong Court.

This case was tried under the provisions of G.L. c. 278, §§ 33A-33G (R. 5). The entry of the appeal did not transfer the case from the Superior Court to the Supreme Judicial Court, but only the law questions raised. G.L. c. 278, § 33E. The final judgment was entered in the Superior Court. The rescript from the Supreme Judicial Court is not a judgment, but merely a direction as to what judgment should be entered in the Superior Court. *Gray* v. *Cook*, 135 Mass. 189, 190.

Conclusion.

For the reasons presented in section F of the Argument herein the petition for certiorari should be dismissed. Alternatively, for the reasons presented in the other sections of our Argument, the petition should be denied.

Respectfully submitted,

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[Appendix follows.]

Appendix I.

RULES FOR THE REGULATION OF PRACTICE BEFORE THE FULL COURT OF THE SUPREME JUDICIAL COURT (1952, AS AMENDED NOVEMBER 5, 1962).

13.

NO ORAL ARGUMENT WITHOUT BRIEF EXCEPT BY LEAVE OF COURT.

No oral argument shall be heard, except by special permission of the court, in behalf of a party for whom no brief has been filed as provided in these rules. The court need not pass upon questions or issues not argued in briefs. Nothing argued in a brief shall be deemed to be waived by a failure to argue orally.

16.

TIMES FOR FILING BRIEFS.

(A) Except as provided elsewhere in this rule, the brief of the party entering a case in the full court shall be filed not later than the twenty-eighth day after entry of the case, and briefs of other parties shall be filed not later than the forty-ninth day after such entry. If the last day for filing any such brief falls on a legal holiday, the brief may be filed on the next working day. Not later than one day (exclusive of a Saturday, Sunday, or holiday) before the first day of the sitting at which the case is in order for argument, any party may file a brief in reply. Each party shall file with his brief a certificate of mailing or delivering a copy to counsel for each other party. Twenty-five copies of each brief shall be filed.

(B) If the time for filing the brief for the party entering a case falls between the twenty-seventh day prior to the May sitting and August 31, the parties may agree to extend the time for filing such brief to a date not later than

the third Monday of September and the briefs of other parties twenty-one days later. Such a case shall not be argued before the first Monday of November unless the party entering the case is required by such agreement to file his brief prior to August 15. Such agreement shall be filed with the clerk not later than seven days after entry of the case.

(C) No brief may be filed at any other time except as may be provided by agreement filed with the clerk and approved by a justice.